Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 03 785

IN THE

Supreme Court of the United States

Carol Bennett, Executrix and Personal Representative substituted for Estate of Louis Dalenko (deceased), (and) Carol Bennett, individually

Petitioner

v.

Wake County Department of Human Services, Thomas B. Hogan, Susan Harmon, and Lou A. Newman,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
To The North Carolina Court of Appeals
(from Case No. COA02-377)

PETITION FOR WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED (I-IV)

Estate of Louis Dalenko (deceased),
by Personal Representative

Preface: The first Questions Presented relate to improper dismissal of a North Carolina Superior Court negligence action against Wake County *et al*, for damages to the Estate of Louis Dalenko for personal injury to Louis Dalenko during the 1995 incompetence and guardianship proceedings brought by Wake County, to attach and "spend down" sizable Estates of helpless, elderly citizens as a source of revenue, and an excessive award of prosecution bonds for attorney fees to self-representing defendants.

I. DID THE NORTH CAROLINA COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT AFFIRMED WAKE COUNTY SUPERIOR COURT'S DISMISSAL OF THE ACTION FOR FAILURE TO STATE A CLAIM, *ON THE GROUND THAT* THE "*PRO SE*" PLEADINGS SUPPORT A CLAIM FOR WILLFUL NEGLIGENCE AS A MATTER OF LAW?

II. DID THE NORTH CAROLINA COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT AFFIRMED WAKE COUNTY SUPERIOR COURT'S DISMISSAL OF THE ACTION FOR FAILURE TO ALLEGE WAIVER OF GOVERNMENTAL IMMUNITY, *ON THE GROUND THAT* THE SUPERIOR COURT DENIED THE PRIOR MOTION TO AMEND PLEADINGS TO ALLEGE WAIVER OF IMMUNITY BY INSURANCE AS "NON-CURATIVE"?

III. DID THE NORTH CAROLINA COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT AFFIRMED WAKE COUNTY SUPERIOR COURT'S DISMISSAL OF THE ACTION AGAINST ALL

DEFENDANTS, *ON THE GROUND THAT* THE "*PRO SE*" ALLEGATIONS WERE SUFFICIENTLY WELL PLED AND ARGUED TO THE SUPERIOR COURT TO DEFEAT INDIVIDUAL IMMUNITIES?

IV. DID THE NORTH CAROLINA COURT OF APPEALS ABUSE ITS DISCRETION WHEN IT AFFIRMED WAKE COUNTY SUPERIOR COURT'S AWARD OF ($20,000) CASH PROSECUTION BOND FOR ATTORNEY FEES TO THE SELF-REPRESENTING DEFENDANTS, *ON THE GROUND THAT* THE AWARD CONFLICTS WITH APPELLATE COURT INTERPRETATIONS OF N.C.G.S. §1-109?

* * *

QUESTIONS PRESENTED (V-VIII)

Carol Bennett, individually

Preface: The second Questions Presented relate to an improper dismissal of Carol Bennett's individual appeal from an Order awarding sanctions as attorneys' fees to the self-representing defendants, which benefits Wake County ($10,900.00), and ordering a pre-filing injunction that deters attorneys and restricts or otherwise bars Carol Bennett's access to the courts in all Wake County matters, for filing a allegedly frivolous negligence (personal injury) action against Wake County, *et al*, on behalf of her incompetent father, Louis Dalenko.

V. DID THE NORTH CAROLINA COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT DISMISSED CAROL BENNETT'S INDIVIDUAL APPEAL, *ON THE GROUND THAT* HER SUBSTITUTE BRIEF WAS TIMELY FILED?

VI. DID THE NORTH CAROLINA COURT OF APPEALS ABUSE ITS DISCRETION WHEN IT ALLOWED DEFENDANTS' MAY 22, 2002 MOTIONS TO DISMISS BENNETT'S INDIVIDUAL APPEAL, *ON THE GROUND THAT* IT DENIED THE SAME EXACT MOTION TO REVIEW "THE DALENKO APPEAL"?

VII. DID THE NORTH CAROLINA COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT ALLOWED (4) MOTIONS TO DISMISS BENNETT'S INDIVIDUAL APPEAL, *ON THE GROUND THAT* THE ORDERS ARE INCONGRUENT WITH PRIOR ORDERS EXTENDING TIME TO FILE HER BRIEF?

VIII. DID THE NORTH CAROLINA COURT OF APPEALS ABUSE ITS DISCRETION WHEN IT DISMISSED BENNETT'S INDIVIDUAL APPEAL *ON THE GROUND THAT* THE COURT FOUND A JUSTICIABLE CLAIM FOR NEGLIGENCE IN THE DALENKO APPEAL SUFFICIENT TO REVERSE THE AWARD OF SANCTIONS AND PRE-FILING INJUNCTION AGAINST BENNETT?

* * *

LIST OF PARTIES

Petitioner (plaintiff-appellee):

Carol Bennett, Executrix and Personal Representative
for the Estate of Louis Dalenko (deceased);
(and)
Carol Bennett, individually (*pro se*)

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Knightdale, NC 27545-8577
Telephone: (919) 217-2410

Respondents (defendants-appellees):

Wake County Department of Human Services,
Thomas B. Hogan, director, and Susan Harmon,
social worker and individual,
(by)
Corinne G. Russell, Deputy Attorney (NCSB # 9446)
Wake County Attorney's Office
P.O. Box 550, Raleigh, NC 27602
Telephone: (919) 856-5500

Respondent (defendant-appellee):

Lou A. Newman (*pro se*)
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Raleigh, NC 27605
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TABLE OF CONTENTS

QUESTIONS PRESENTED (Dalenko) i

QUESTIONS PRESENTED (Bennett) ii

LIST OF PARTIES iv

TABLE OF CONTENTS v

TABLE OF APPENDICES (VOLUMN I I) vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTOY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE (Estate of Louis Dalenko, deceased) 5

STATEMENT OF THE CASE (Carol Bennett, individually) 8

REASONS FOR GRANTING THE WRIT (Estate of Louis Dalenko, deceased) 11

REASONS FOR GRANTING THE WRIT (Carol Bennett, individually) 13

CONCLUSION 15

TABLE OF APPENDICES (VOL. II)

APPENDIX A DECISION OF NC COURT OF APPEALS: OPINION, April 1, 2003 (Dalenko, Bennett)

APPENDIX B ORDERS (2) of NC Court of Appeals allowing Motions To Dismiss Appeal (Bennett only, denied as to Dalenko)

APPENDIX C ORDERS (4) of NC Court of Appeals allow Motions to Dismiss Appeal (Bennett)

APPENDIX D ORDER of State Superior Court, Wake Co. denying amendment of *pro se* pleadings, and dismissing action (Dalenko)

APPENDIX E ORDER of State Superior Court, Wake Co. awarding prosecution bonds (Dalenko)

APPENDIX F ORDER of State Superior Court, Wake Co. awarding sanctions as attorney fees and a pre-filing injunction (Bennett, individually)

APPENDIX G ORDERS of Supreme Court of N.C. denying review from NC Court of Appeals

APPENDIX H ORDERS of Supreme Court of N.C. denying PWS/Stay of injunction (Bennett)

APPENDIX I ORDERS of NC Court of Appeals, allowing consecutive time extensions (Bennett)

APPENDIX J AFFIDAVIT of Clerk, NC Court of Appeals confirming brief timely filed (Bennett)

APPENDIX K ORDER of John M. Kennedy, CSC, from Cause of Action on 16 Nov 1995 (Dalenko)

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

N.C.G.S. § 1A-1, Rule 12(b)(6) 3,6,7
N.C.G.S. § 1A-1, Rule 15(a) 4,6
N.C.G.S. § 1A-1, Rule 17(a) 4,8
N.C.G.S. § 1A-1, Rule 17(b)(1) 4,6,8
N.C.G.S. § 1-109 4,7

OTHER

Fourteenth Amendment of the U.S. Constitution ... 3,6,11-14

North Carolina Constitution, Art. I, Secs. 18-19 3,14,15

IN THE

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS AND ORDERS BELOW

The opinions of the North Carolina Court of Appeals, the highest state court to review the merits, appear to this petition at the following Appendices, and reported as follows:

APPENDIX	REPORTED AT
A	157 N.C.App. 49, 578 S.E.2d 599 (2003) (published) OPINION, April 1, 2003
B	(unreported) ORDERS (2) entered April 1, 2003 allowing Motions To Dismiss Appeal filed May 22, 2002 (in part, only as to Bennett individually)
C	(unreported) ORDERS (4) entered April 1, 2003 allowing Motions To Dismiss Appeal filed August 19, 2002 (2), September 3, 2002, and September 13, 2002 (Bennett, individually)

JURISDICTION

The date on which the highest state court decided this case was August 26, 2003 by the Supreme Court of North Carolina. A copy of those decisions appear at Appendix G.

The jurisdiction of this Court is invoked under:

28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of North Carolina, Article I:

Sec. 18. Courts shall be open. All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Sec. 19. Law of the land; equal protection of the laws. No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

North Carolina Rules of Civil Procedure:

N.C.G.S. §1A-1, Rule 12(b)(6): is a defense against a claim that may be pled to allege "failure to state a claim upon which relief may be granted" as a matter of law.

N.C.G.S. §1A-1, Rule 15(a): provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served".

N.C.G.S. §1A-1, Rule 17(a): provides that "a party [specified]...may sue in his own name...[on behalf of] the party for whose benefit the action is brought...until a reasonable time has been allowed...[for] joinder or substitution of, the real party in interest".

N.C.G.S. §1A-1, Rule 17(b)(1): requires that an incompetent plaintiff "must appear by general or testamentary guardian..., or by guardian *ad litem* appointed as hereinafter provided".

North Carolina General Statutes:

N.C.G.S. §1-109: "At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, shall require the plaintiff to do one of the following things and the failure to comply with such order within 30 days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:

(1) Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.
(2) Deposit two hundred dollars ($200.00) with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant all costs which the latter recovers of him in the action.
(3) File a copy of an order from a superior or district court judge or clerk of a superior court authorizing the plaintiff to use as an indigent.

The requirements of this section shall not apply to the State of North Carolina or any of its ...counties...."

STATEMENT OF THE CASE

Estate of Louis Dalenko (deceased) by Personal Representative, Carol Bennett

The Assistant Clerk of Superior Court, Wake County, appointed Carol Bennett, Louis Dalenko's daughter, as Interim General Guardian on May 26, 2000 upon application in the Special Proceedings (95-SP-1297) of attorney Kevin Hopper, to file the subject negligence (personal injury) action on behalf of her incompetent father, Louis Dalenko.

This action is a re-filing on May 26, 2000 after Voluntary Dismissal of the prior action on May 26, 1999, accruing from personal injury to Louis Dalenko on or about November 16, 1995 at the direct and proximate cause of the defendants' gross negligence. The defendants' acts complained of were:

- in conspicuous breach of duties owed to Louis Dalenko during the incompetence and guardianship proceedings initiated by Wake County;

- in willful contempt of a court order that Louis Dalenko remain at home with his daughter; and

- for an alleged purpose, to attach and "spend down" sizable estates of senior citizens as revenue for Wake County.

After the action was filed, the clerk by Order of July 11, 2000 (R pp. 44-53) vacated Carol Bennett's Interim Guardian appointment on defendant Newman's "motion in the cause", criticized the ethics and professional conduct of attorney Kevin Hopper, and by Order of July 31, 2000 (R pp. 31-32) refused Carol Bennett's motion to appoint another attorney as guardian *ad litem* to appear on Louis Dalenko's behalf, amend the complaint, and prosecute the action.

Louis Dalenko was denied his statutory and Fourteenth Amendment rights, equal with competent adults, to appear as an incompetent party-plaintiff in the negligence action through a competent representative, as required pursuant to Rule 17(b)(1) of the N.C.R. Civ. P.

Carol Bennett, in her initial interim capacity, filed a "*pro se*" Amended Complaint on February 5, 2001 (R pp. 290-334) pursuant to N.C.R. Civ. P. 15(a), relating back to the original Complaint, where no responsive pleading had ever been filed, and she could not find any more attorneys willing to risk getting involved in this sensitive matter.

After Louis Dalenko died on January 5, 2001, Carol Bennett, his daughter, sole heir, and Testamentary Executrix for his Estate, was appointed and substituted in the action as Personal Representative for the Estate of Louis Dalenko by "Order Of Substitution" entered February 27, 2001 (R pp. 371-373).

The action came before Superior Court Judge Narley L. Cashwell on April 30, 2003 on the defendants' "Motions To Dismiss" pursuant to Rule 12(b)(6) of the N.C.R. Civ. P. The hearing was continued to permit Carol Bennett to inquire of the State Bar if an attorney was required to appear on behalf of the Estate, and to file a "Motion For Leave To File Supplemental Amended Complaint".

The North Carolina State Bar issued an Advisory Opinion, No. 01-AP-0024 dated May 3, 2001, emphasizing the Personal Representative's duty to prosecute actions on behalf of the Estate of Louis Dalenko, and further concluded that an attorney is not required to appear in an action on behalf of the Estate of Louis Dalenko.

Carol Bennett as Personal Representative filed a *"pro se"* motion and amended motion on May 14, 2001 and June 26,

2001, for leave to amend and/or supplement the pleadings on Dalenko's behalf (R pp. 471-492,) to reflect substitution of party, comply with rules, and allege waiver of governmental immunity by purchase of insurance (R pp. 500-502).

On June 27, 2001, Superior Court Judge Cashwell denied the Motion for leave to amend pleadings and dismissed the action pursuant to Rule 12(b)(6) of the N.C.R. Civ. P. for alleged "fail[ure] to state a claim upon which relief could be granted" (R pp. 535-537, APPENDIX D). Judge Cashwell entered an "Order Awarding Prosecution Bonds" in the sum of $20,000 cash (R pp. 516-520, APPENDIX E), to secure the self-representing defendants' "costs" in the action pursuant to N.C.G.S. § 1-109.

Carol Bennett appealed as Personal Representative on behalf of Dalenko's Estate. The North Carolina Court of Appeals affirmed the Superior Court by OPINION issued April 1, 2003 (APPENDIX A). The Supreme Court of North Carolina denied the Notice of Appeal of right on behalf of Dalenko's Estate in conference on August 21, 2003, and certified and entered by the Clerk of Supreme Court of N.C. on **August 26, 2003** (APPENDIX G).

* * *

STATEMENT OF THE CASE

Carol Bennett, individually

Carol Bennett initially added herself as a party-plaintiff to the subject negligence action to protect the action on behalf of personal injury to her incompetent father, Louis Dalenko, pending an appointment pursuant to Rule 17(b)(1) of the N.C.R. Civ. P. for Louis Dalenko to appear as the real party plaintiff. (See Rule 17(a) of the N.C.R. Civ. P.).

After the court by Order entered July 31, 2000 (R pp. 31-32), refused to appoint an attorney guardian *ad litem* to appear and prosecute the action on Louis Dalenko's behalf, and admonished the first attorney Kevin Hopper by Order entered July 11, 2000 (R pp. 44-53), the defendants pursued and obtained an "Order Awarding Prosecution Bonds" entered by Judge A. Leon Stanback on August 25, 2000 (R pp. 89-93), against Carol Bennett, individually, ordering her to post $10,000.00 cash in (30) days to secure the self-representing defendants' "costs".

Carol Bennett fought the Order Awarding Prosecution Bonds as a *pro se* by filing a Motion To Reconsider on constitutional grounds as denying access to the courts when she could not pay (R pp. 79-82). She amended it (R pp. 96-99) after defendant Newman filed a "Motion To Dismiss Motion To Reconsider... And Motion For Sanctions" (R pp. 116-119). Carol Bennett also attempted to appeal the prosecution bonds as affecting a substantial right to proceed in the action (R pp. 106-107), and sought a stay of the Order (R pp. 109-111) that was denied (R pp. 127-128).

Superior Court Judge Stanback dismissed Bennett's appeal from the prosecution bonds, allegedly for failing to order a transcript that was already on file (R. 227-229). Carol Bennett filed a Motion To Vacate Order (R pp. 238-240)

dismissing her appeal as void for lack of jurisdiction during appeal. She amended the motion (R pp. 337-339) after defendant Newman filed a Motion To Dismiss Motion To Vacate Order And Motion For Sanctions (R pp. 261-268).

Judge Stanback denied Carol Bennett's Motion To Reconsider the prosecution bonds *without sanctions* (R pp. 213-214), and denied her Motion To Vacate Order dismissing her appeal from the prosecution bonds *without sanctions* (R pp. 440-441).

The defendants filed in total of (6) "Motions For Sanctions" against Carol Bennett, individually. Judge Abraham P. Jones ordered that the Motions For Sanctions relating to proseution bonds be heard before Judge Stanback (R pp. 129-130).

After Louis Dalenko died on January 5, 2001, Judge Henry W. Hight, Jr. removed Carol Bennett from the action for failure to post the ordered $10,000.00 prosecution bonds, as the only proper sanction, considering all lessor sanctions. Judge Hight also appointed Carol Bennett as Personal Representative to appear in the action on behalf of the Estate of Louis Dalenko.

The defendants brought before Judge Narley L. Cashwell on April 30, 2001 their same and/or restated "Motions For Sanctions" and prayers for an injunction restricting Carol Bennett's access to the courts without an attorney. These motions appear in the Record at (R pp. 116-119, 249-259, 261-268, 378-401, 402-417, 421-424).

Judge Cashwell did not rule in session, but signed the defendants' 13-page proposed Order on June 27, 2001 allowing all motions for sanctions as attorneys fees (total $27,400.00) to the self-representing defendants, including a pre-filing injunction restricting or otherwise acting to bar Carol Bennett's access to the courts in all Wake County

matters without attaching a certification by a North Carolina licensed attorney that has read the Order, subject to civil and/or criminal contempt against her or anyone on her behalf.

Carol Bennett appealed, individually, from the 13-page "Order Granting Sanctions and Attorneys Fees" (R pp. 521-534, APPENDIX F). Her appeal was dismissed by Opinion issued April 1, 2003, for allegedly filing her brief on Monday, October 7, 2002, instead of within sequential extensions of time allowed through Friday, October 4, 2002 (APPENDIX A, pp. A4-A5).

The North Carolina Court of Appeals also entered (2) Orders on April 1, 2003, allowing the defendants' (2) Motions To Dismiss Appeal filed May 22, 2002 as to Carol Bennett only, but denied them as to the Dalenko appeal (APPENDIX B).

The North Carolina Court of Appeals also entered (4) Orders on April 1, 2003, allowing the defendants' (4) Motions To Dismiss Appeal as to Bennett, individually, filed August 19 (2), September 3, and September 13, 2002 on time issues.

The Supreme Court of North Carolina denied Carol Bennett's Petition For Writ Of Supersedeas and Motion For Temporary Stay of the injunction restricting or barring her access to the Wake County courts (APPENDIX H).

The Supreme Court of North Carolina denied Carol Bennett's Notice of Appeal and Petition For Discretionary Review from the Opinion of the Court of Appeals dismissing her individual appeal and denied her Petition For Writ Of Certiorari from the (6) Orders entered April 1, 2003 dismissing her appeal in conference on August 21, 2003, certified and entered by the Clerk of the Supreme Court of North Carolina on **August 26, 2003** (APPENDIX G).

* * *

REASONS FOR GRANTING THE PETITION

"The Dalenko Appeal"

on behalf of Estate of Louis Dalenko (deceased), by Personal Representative Carol Bennett

This Petition is of substantial importance to helpless incompetent citizens who may be exploited and their estates abused by government officials, and denied their Fourteenth Amendment rights to address their grievances to the courts, equal with competent adults.

Review of "The Dalenko Appeal" was not *meaningful*, and is scarcely recognizable from the OPINION (APPENIX A) as the same cause of action for personal injury on behalf of damages to Dalenko's Estate. The facts have been misconstrued by the defendants, the prior Opinion relied on was *unpublished*, and controlling factors were completely circumvented (see APPENDIX K), solely to protect the State from liability on its own behalf against the claims of an incompetent ward of the State it was obligated to protect.

This "*pro se*" Petition should be granted on behalf of Estate of Louis Dalenko, and on behalf of the rights of all incompetent citizens in North Carolina, because the cause is just that the defendants should be liable for their negligence:

- to protect the Fourteenth Amendment rights of all incompetent citizens subjected to abuse of discretion by the courts in North Carolina;

- to deter threats against senior citizens vulnerable to being declared incompetent and deprived of their rights and freedom without clear and cogent cause or without just protection as a ward of the State of North Carolina;

- to protect the estates and well-being of incompetent adults from government officials that would abuse their authority and conspire to attach and spend down estates of helpless incompetents to generate revenue;

- to protect the rights of all citizens in North Carolina to age gracefully as free citizens with confidence in the protection of the State and guarantees of the U.S. Constitution.

The circumstances of this matter, starting with the unwarranted intervention of government officials and agents into the privacy of Louis Dalenko's home with is daughter, is very frightening to anyone that might grow old in North Carolina. We need the protection of the U.S. Supreme Court.

Every incompetent citizen in North Carolina is entitled to the protection of the U.S. Supreme Court under the Fourteenth Amendment to equal protection under the laws and open access to the courts to prosecute or defend their claims through capable counsel, equal with competent adults who are able to help themselves.

* * *

REASONS FOR GRANTING THE PETITION

Carol Bennett, individually

Carol Bennett is entitled according to her Fourteenth Amendment rights to *meaningful* due process, to a review on the merits of her individual appeal from sanctions as attorneys' fees to the self-representing defendants, and a pre-filing injunction that restricts or otherwise forever bars her access to the courts in all Wake County matters, subject to civil and/or criminal contempt against anyone on her behalf. (APPENDIX F, pp. F20-F21).

This writ should issue because Carol Bennett's appeal was improperly dismissed by the N.C. Court of Appeals for allegedly filing her Substitute Brief late (APPENDIX A, pp. A4-A5). The Affidavit of the Clerk of the N.C. Court of Appeals (APPENDIX J) confirms that Carol Bennett's brief was timely filed on October 4, 2002 by U.S. Mail.

The Orders dismissing her appeal (APPENDIX B), on the same issues that the N.C. Court of Appeals did not dismiss "The Dalenko Appeal", should be reversed. The issues raised by the defendants' Motions To Dismiss Appeal are based on misrepresentations of fact by defendant Newman that she reasonably knew were untrue when made.

The Orders dismissing Carol Bennett's appeal (APPENDIX C) for failure to take timely action alleged by the defendants' Motions To.Dismiss Appeal, are incongruent by prior Orders sequentially allowing Carol Bennett extensions of time though October 4, 2002, to file her brief (APPENDIX I).

This Petition should be granted on behalf of the merits of Carol Bennett's individual appeal, because:

- her Arguments raise substantial issues of significant public interest on the Fourteenth-Amendment rights of *pro se* litigants to *meaningful* due process, equal with citizens represented by attorneys;

- her Arguments raised are also of substantial importance to the jurisprudence of the State that have not previously been considered by the lower courts, on issues of: whether a *pro se* is entitled to "attorney fees" for his own time spent, jurisdiction of a court to render a decision out of session, and others;

- dismissal of her appeal from $27,400 sanctions as attorney fees to the self-representing defendants, has affected a substantial right to her property, which the Superior Court required her to post as an appeal bond and lost without her right to a review;

- dismissal of her appeal from an extreme pre-filing injunction in all Wake County matters, that threatens civil and/or criminal contempt against anyone on her behalf, continues to act as an absolute bar to her Fourteenth Amendment rights to access to the courts, to defend her claims and protect herself from claims against her.

Carol Bennett is entitled to have her appeal reviewed on its merits according to due process as a *pro se* litigant, equal with all citizens, including attorneys, to protect her rights under the Fourteenth Amendment of the U.S. Constitution and the Constitution of North Carolina, Article I, Secs. 18-19, denied by the Order Granting Sanctions And Attorneys' Fees (APPENDIX F).

* * *

CONCLUSION

The petition for a writ of certiorari should be granted for "The Dalenko Appeal" and Carol Bennett's individual appeal, for good cause on behalf of all incompetent and *pro se* citizens in North Carolina, to protect their rights guaranteed by the Fourteenth Amendment, and Art. I, Secs. 18-19 of the N.C. Constitution, equal with competent adults and with attorneys.

Respectfully submitted,

Carol Bennett, Executrix and Personal Representative for the Estate of Louis Dalenko (deceased); (and)
Carol Bennett, individually.

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Date: November 24, 2003

TABLE OF APPENDICES

APPENDIX A	DECISION OF NC COURT OF APPEALS: OPINION, April 1, 2003 (Dalenko, Bennett)
APPENDIX B	ORDERS (2) of NC Court of Appeals allowing Motions To Dismiss Appeal (Bennett only, denied as to Dalenko)
APPENDIX C	ORDERS (4) of NC Court of Appeals allow Motions to Dismiss Appeal (Bennett)
APPENDIX D	ORDER of State Superior Court, Wake Co. denying amendment of *pro se* pleadings, and dismissing action (Dalenko)
APPENDIX E	ORDER of State Superior Court, Wake Co. awarding prosecution bonds (Dalenko)
APPENDIX F	ORDER of State Superior Court, Wake Co. awarding sanctions as attorney fees and a pre-filing injunction (Bennett, individually)
APPENDIX G	ORDERS of Supreme Court of N.C. denying review from NC Court of Appeals
APPENDIX H	ORDERS of Supreme Court of N.C. denying PWS/Stay of injunction (Bennett)
APPENDIX I	ORDERS of NC Court of Appeals, allowing consecutive time extensions (Bennett)
APPENDIX J	AFFIDAVIT of Clerk, NC Court of Appeals confirming brief timely filed (Bennett)
APPENDIX K	ORDER of John M. Kennedy, CSC, from Cause of Action on 16 Nov 1995 (Dalenko)

APPENDIX A

"OPINION"

COA02-377
APRIL 1, 2003

Reported: 157 N.C.App. 49, 578 S.E.2d 599 (2003)

J. MARTIN, (J. EAGLES, J. GEER)
NORTH CAROLINA COURT OF APPEALS
RALEIGH, NORTH CAROLINA

Plaintiffs: Estate of Louis Dalenko (deceased), by Personal Representative, Carol Bennett; (and) Carol Bennett, individually.

From No. 00-CVS-5994
Judge Narley L. Cashwell
Wake County Superior Court
Raleigh, NC

From final orders entered June 27, 2001:

Denying leave to amend pleadings (Dalenko);
Dismissing action under 12(b)(6), (Dalenko);
Awarding $20,000 prosecution bonds (Dalenko);
(and)
Sanctions, attorney's fees, injuntion (Bennett).

NO. COA02-377

NORTH CAROLINA COURT OF APPEALS

Filed: 1 April 2003

FILED
03 APR-1 AM 7:35
CLERK COURT OF APPEALS
OF NORTH CAROLINA

LOUIS DALENKO, an incompetent
by Interim General Guardian,
Carol Bennett and CAROL BENNETT,
individually, Plaintiffs,

v.

Wake County
No. 00-CVS-5994

WAKE COUNTY DEPARTMENT OF
HUMAN SERVICES, Thomas W. Hogan,
Director, and SUSAN HARMON, Social
Worker and Individual, LOU A.
NEWMAN, a Professional, Defendants.

**601 *51 Appeal by plaintiffs from orders entered 27 June 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 10 February 2003.

Carol Bennett, *pro se*, for plaintiff-appellants.

Lou Newman, *pro se*, for defendant-appellee; and Deputy Wake County Attorney Corinne G. Russell for defendant-appellees Department of Human Services and Susan Harmon.

MARTIN, Judge.

Plaintiff Carol Bennett, in her capacity as personal representative for the estate of her father, Louis Dalenko ("Dalenko"), appeals the dismissal of her amended complaint for its failure to state a claim for relief against Wake County Department of Human Services ("DHS"), Susan Harmon ("Harmon") in her official and individual capacities, and Lou

Newman ("Newman") as Dalenko's court-appointed guardian ad litem. In her capacity as personal representative, plaintiff also appeals the entry of an order requiring that she post prosecution *52 bonds as security for costs. Plaintiff individually appeals the entry of an order awarding sanctions and attorney's fees against her upon a finding that her individual action is wholly frivolous.

The instant action, which plaintiff initiated by the filing of a complaint on 26 May 2000, is a re-filing of an action against defendants which plaintiff filed on behalf of Dalenko as an incompetent on 7 December 1998. Both actions arose out of defendants' initiation of incompetency and guardianship proceedings as to Dalenko and their subsequent intervention in plaintiff's care of Dalenko. Plaintiff took a voluntary dismissal without prejudice of her 7 December 1998 action on 26 May 1999. Subsequently, upon motion of defendant Newman, the trial court ordered plaintiff to pay attorney's fees as a sanction upon its finding that plaintiff's 7 December 1998 complaint lacked any justiciable issue of law or fact and that plaintiff had failed to make a reasonable inquiry into the allegations of the complaint. Plaintiff appealed that order, and on 2 October 2001, this Court affirmed the lower court's award of sanctions and upheld its determination that the complaint was legally implausible on its face. *See Bennett v. Harmon*, 146 N.C.App. 447, 554 S.E.2d 420 (unpublished, No. COA00-1055, 2 October 2001).

While that appeal was pending, plaintiff initiated this action with the filing of a more detailed complaint in May 2000, followed by an amended complaint on 5 February 2001. By order entered 21 February 2001, following Dalenko's death in January 2001, plaintiff was substituted as plaintiff as the personal representative of his estate. The amended complaint alleged the same claims of negligence against defendants as the December 1998 complaint, although through more

detailed allegations. In essence, the amended complaint alleged, *inter alia,* that plaintiff was providing appropriate care for Dalenko, who was elderly, in poor health, and lived with plaintiff; that defendants unjustifiably initiated incompetency and guardianship proceedings and conspired to separate plaintiff from Dalenko; that throughout the proceedings, defendants misrepresented the facts to the court and used coercive tactics on Dalenko's health care providers in an effort to separate plaintiff and Dalenko; that due to these misrepresentations, plaintiff was ordered to allow defendants unlimited access to Dalenko without interference, and DHS was appointed interim guardian of Dalenko in charge of his health care; that defendants' presence, as well as the presence of other health care workers in plaintiff's home invaded plaintiff's and Dalenko's privacy; that defendants attempted to remove Dalenko from **602 plaintiff's *53 home against his will with the assistance of local authorities resulting in great emotional distress to plaintiff and Dalenko; and that defendant Newman negligently failed to fulfill her duty to Dalenko as guardian ad litem by failing to advocate for his best interests.

On 21 February 2001, the trial court entered an order dismissing the amended complaint insofar as it contained plaintiff's individual claims due to her failure to post prosecution bonds in accordance with a previous order. Plaintiff has not appealed that dismissal. On 27 June 2001, upon motion of defendants, the trial court entered an order dismissing the amended complaint, insofar as it attempted to assert claims on behalf of Dalenko pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for the failure of the complaint to state a claim for relief. The trial court also entered orders on that date awarding prosecution bonds and awarding judgment in favor of defendants for sanctions and attorney's fees against plaintiff individually for the failure of the amended complaint to state any issue of justiciable law or

fact, and because plaintiff's multiple filings in the matter were frivolous and "interposed for the improper purposes of harassment and to cause unnecessary delay and increased costs of litigation."

Plaintiff appeals from the 27 June 2001 orders dismissing the complaint, awarding prosecution bonds, and awarding sanctions and attorney's fees. Plaintiff has filed two briefs on appeal: a brief in her capacity as personal representative of Dalenko's estate in which she assigns error to the dismissal of the amended complaint and the order awarding prosecution bonds, and a brief on her own behalf, appealing from the order awarding sanctions and attorney's fees to defendants.

As an initial matter, defendants have filed several motions to dismiss plaintiff's appeal, individually and as personal representative for Dalenko, for numerous violations of the Rules of Appellate Procedure and because the issues presented by her appeal are moot in the face of our prior decision affirming the trial court's determination that plaintiff's claims were legally implausible.

As to plaintiff's individual appeal from the order awarding sanctions and attorney's fees, the record confirms the presence of several flagrant rules violations, including plaintiff's failure to timely file her appellant's brief despite obtaining several extensions of time in which to do so. Plaintiff sought and received four extensions *54 of time before filing an 88-page brief, which was stricken by the Court on 4 September 2002. She was ordered to file a brief in compliance with the appellate rules no later than 9 September 2002. Plaintiff failed to comply with this order, but obtained another extension of time to file her brief no later than 4 October 2002. She did not file her brief until 7 October 2002, and did not seek an additional extension of time within which

to file it. In light of the numerous opportunities to timely file a brief in compliance with the appellate rules, and plaintiff's repeated failure to do so, her appeal is subject to dismissal. Defendants' motion to dismiss plaintiff's individual appeal is allowed. *See* N.C.R.App. P. 25.

Although plaintiff, in her representative capacity, has also violated the Rules of Appellate Procedure in the filing of the appeal and brief as to the claims asserted on behalf of Dalenko, plaintiff obtained only one extension of time in which to file that brief, the brief was filed within 4 days of the deadline, and plaintiff asserted and documented the reason for the delay. Therefore, although the Dalenko appeal is also subject to dismissal for rules violations, we elect to exercise our discretion and review the matter on its merits. *See* N.C.R.App. P. 2. We also disagree that the appeal has been rendered moot in light of our prior decision, as that holding addressed only the issue of sanctions, and although plaintiff's claims are essentially the same in both cases, the amended complaint at issue here is significantly more detailed than that in the prior action.

I.

Plaintiff first argues the trial court erred in dismissing the amended complaint for its failure to state a claim on behalf of Dalenko **603 upon which relief may be granted. Defendants counter that dismissal was appropriate as to DHS and Harmon in her official capacity under the doctrine of sovereign immunity; that dismissal as to Harmon individually was proper under the doctrine of public official immunity; and that dismissal was proper as to Newman under the doctrine of quasi-judicial immunity. We agree with defendants.

"In reviewing a Rule 12(b)(6) motion, a court must determine 'whether, as a matter of law, the allegations of the complaint,

treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.' " *Cline v. McCullen,* 148 N.C.App. 147, 149, 557 S.E.2d 588, 590 (2001) (citation omitted). "The trial court may grant this motion if 'there is a want of law to support a claim of the sort made, an absence of facts *55 sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.' " *Id.* (citation omitted).

"Sovereign immunity ordinarily grants the state, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits." *Paquette v. County of Durham*, 155N.C.App. 415, ----, 573 S.E.2d 715, 717 (2002). "The rule of sovereign immunity applies when the governmental entity is being sued for the performance of a governmental, rather than proprietary, function." *Id.* That entity may waive its sovereign immunity through actions such as the purchase of liability insurance. *Id.* "Unless waived, 'the immunity provided by the doctrine [of sovereign immunity] is absolute and unqualified.' " *Midgett v. N.C. DOT*, 152 N.C.App. 666, 667, 568 S.E.2d 643, 645 (citation omitted), *cert. denied,* 356 N.C. 438, 572 S.E.2d 786 (2002). "In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Paquette*, 155 N.C.App. at ----, 573 S.E.2d at 717 (holding trial court did not err in dismissing complaint where it failed to specifically allege county waived its sovereign immunity); *see also, e.g., Vest v. Easley*, 145 N.C.App. 70, 74, 549 S.E.2d 568, 573 (2001) ("It is well-established law that with no allegation of waiver in a plaintiff's complaint, the plaintiff is absolutely barred from suing the state and its public officials in their official capacities in an action for negligence.").

The amended complaint in the present case does not allege a waiver of defendants' sovereign immunity. Therefore, the complaint fails to state a claim for relief against DHS and Harmon in her official capacity. *See Harwood v. Johnson*, 326 N.C. 231, 237, 388 S.E.2d 439, 443 (where suit cannot be maintained against governmental entity, suit may not be maintained against employee of that entity for actions taken in employee's official capacity), *reh'g denied*, 326 N.C. 488, 392 S.E.2d 90 (1990). Although plaintiff maintains the allegations of the amended complaint establish a "special relationship" between defendants and Dalenko which pierces their immunity, such an exception applies to the public duty doctrine, not sovereign immunity.

We further agree with defendants that Harmon as an individual is protected by public official immunity. A public official is one who "exercises some portion of sovereign power and discretion, whereas public employees perform ministerial duties." *Mabrey v. Smith*, 144 N.C.App. 119, 122, 548 S.E.2d 183, 186, *disc. review denied*, *56 354 N.C. 219, 554 S.E.2d 340 (2001). The complaint alleges Harmon is a social worker for DHS. Pursuant to G.S. § 108A-14, Harmon has the statutory authority to exercise discretion in that capacity. *See* N.C. Gen.Stat. § 108A-14(b) (2002); *Hobbs v. North Carolina Dep't of Human Resources*, 135 N.C.App. 412, 520 S.E.2d 595 (1999) (holding social workers for county social services are public officials). Moreover, the complaint alleges Harmon took various actions in her capacity as social worker for DHS that clearly required the exercise of discretion and were not simply ministerial. Therefore, Harmon is considered a public official for purposes of immunity.

A public official may not be held individually liable for mere negligence, but may only be liable where her conduct is **604 malicious, corrupt, or outside the scope of her

authority. *Mabrey*, 144 N.C.App. at 122, 548 S.E.2d at 186. A review of the amended complaint in this case shows plaintiff's claims are based on pure negligence. The complaint does not allege Harmon acted maliciously or corruptly as to Dalenko. The complaint also does not allege facts which would support a legal conclusion that any of Harmon's actions as to Dalenko, even if negligent, were outside the scope of her duties as an employee of DHS.

Although well-pleaded factual allegations of the complaint are treated as true for purposes of a 12(b)(6) motion, " ' "conclusions of law or unwarranted deductions of facts are not admitted." ' " *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979) (citations omitted). "Thus, while we are to treat as true plaintiffs' factual allegations, it is our task to determine whether these allegations as a matter of law demonstrate the adequacy, or lack thereof, of legal administrative remedies." *Id.*; *see also Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997) (conclusory allegation that public official acted willfully and wantonly insufficient to overcome motion to dismiss). Although the complaint includes an allegation that Harmon's negligence as to Dalenko was "outside the scope of [her] authority," we are not required to treat this allegation of a legal conclusion as true. We conclude the allegations of the complaint are legally insufficient to overcome Harmon's public official immunity for her allegedly negligent actions as to Dalenko done in the performance of her duties as a social worker for DHS.

Accordingly, the trial court did not err in dismissing plaintiff's complaint as against Harmon individually. The trial court also properly dismissed the complaint against defendant Newman. The complaint alleges that at all times relevant, Newman was a guardian ad litem for Dalenko, and that she was so *57 appointed by the court upon the filing of

a petition for adjudication of incompetence as to Dalenko. As such, Newman is entitled to quasi-judicial immunity.

"Quasi-judicial immunity is an absolute bar, available for individuals in actions taken while exercising their judicial function.... 'Quasi-judicial "decisions involve the application of ... policies to individual situations rather than the adoption of new policies." ' " *Vest*, 145 N.C.App. at 73-74, 549 S.E.2d at 572 (citations omitted). Although the courts of this State have not yet specifically addressed whether guardians ad litem perform judicial functions such that they are entitled to quasi-judicial immunity, several other courts, including the United States Court of Appeals for the Fourth Circuit, have held that guardians ad litem are entitled to the absolute bar of quasi-judicial immunity.

In *Fleming v. Asbill*, 42 F.3d 886 (4th Cir.1994), the Fourth Circuit upheld the district court's determination that a guardian ad litem, as an actor in the judicial process, was entitled to quasi-judicial immunity. The Court noted the policy reasons behind its holding, stating " '[a] guardian ad litem must ... be able to function without the worry of possible later harassment and intimidation from dissatisfied [parties]. Consequently, a grant of absolute immunity would be appropriate. A failure to grant immunity would hamper the duties of a guardian ad litem in his role as advocate ... in judicial proceedings.' " *Id.* at 889 (citation omitted). Several other federal courts and state supreme courts have also held guardians ad litem, as well as social caseworkers, to be entitled to immunity in their various capacities. *See, e.g., Miller v. Gammie*, 292 F.3d 982 (9th Cir.2002); *Lambert v. McGinnis*, 2000 WL 33682695, 2000 U.S. Dist. LEXIS 11848 (E.D.N.C.2000), *affirmed*, 225 F.3d 654 (4th Cir.2000); *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997); *Richards v. Bruce*, 1997 ME 61, 691 A.2d 1223

(1997); *Lythgoe v. Guinn*, 884 P.2d 1085 (Alaska 1994); *Barr v. Day*, 124 Wash.2d 318, 879 P.2d 912 (1994).

The allegations of the amended complaint at issue here establish that at all relevant times, Newman was engaged in her quasi-judicial duties as a court- appointed guardian ad litem, and all claims against Newman arise out of the performance of her duties in that capacity. We hold, agreeing with the **605 policy reasons set forth by the Fourth Circuit in *Fleming*, that Newman is entitled to quasi-judicial immunity to the extent she was an actor in the judicial process vested with the ability to make decisions and apply policies to Dalenko's individual circumstance. This immunity is absolute, and accordingly, *58 plaintiff cannot state a claim for relief against Newman as guardian ad litem.

II.

Plaintiff next argues the trial court lacked subject matter jurisdiction to enter an order requiring that, as Dalenko's personal representative, she post $20,000 in prosecution bonds pursuant to G.S. § 1- 109. After hearing arguments, the trial court informed the parties that it would render decisions at a later date. Its orders, including the order awarding prosecution bonds, were entered out of session approximately two months later.

In our prior opinion in this matter, we rejected an identical argument by plaintiff that the trial court lacked subject matter jurisdiction to enter its order awarding sanctions because the trial court took the issue under advisement and later rendered a decision out of session. *See Bennett v. Harmon*, supra. We noted that under G.S. § 1A -1, Rule 58, which applies to both judgments and orders in civil cases, *see In re Estate of Trull*, 86 N.C.App. 361, 357 S.E.2d 437 (1987), a party will be deemed to have consented to the entry of an order out of session where that party does not expressly object. *See* N.C.

Gen.Stat. § 1A-1, Rule 58 (2002). Here, the record fails to reflect that plaintiff objected when the trial court informed the parties that it would render a decision in the matter at a later date and out of session. In accordance with our prior opinion, this assignment of error is therefore overruled.

III.

Plaintiff also contends the trial court abused its discretion in ordering that she post prosecution bonds in the amount of $20,000 because the evidence failed to support a conclusion that bonds in that amount were warranted. The trial court ordered that plaintiff post $10,000 to secure defendant Newman for recovery of costs in defense of the action, and $10,000 for security as to DHS and defendant Harmon.

We have previously recognized that the trial court has discretion to award prosecution bonds under G.S. § 1-109 which are in excess of the statutory $200 amount. *See Narron v. Union Camp Corp.*, 81 N.C.App. 263, 344 S.E.2d 64 (1986). The purpose of ordering such a bond is "to secure the defendant in the recovery of costs wrongfully paid out by him." *Waldo v. Wilson*, 177 N.C. 461, 463, 100 S.E. 182, 184 (1919).

*59 The trial court in this case entered extensive findings of fact in support of its order awarding prosecution bonds, including that the action was a re-filing of plaintiff's claims from a prior action for which she took a voluntary dismissal; that the prior action was found to be completely lacking in any justiciable issue of law or fact and that plaintiff was sanctioned for filing such a baseless complaint; that plaintiff was considering dismissing the present action because she had received advice that it would take a long time to litigate, would not be profitable, and could result in further sanctions; that plaintiff has a history of filing baseless complaints resulting in sanctions, including one action which was

dismissed for her failure to pay sanctions; that the trial court considered attorney time sheets submitted by defendants; that substantial deposition and other costs were foreseeable given the lengthy pleadings filed by plaintiff; and that there existed good cause to require a bond higher than the statutory amount.

We have reviewed the relevant evidence and conclude the trial court did not abuse its discretion in awarding prosecution bonds totaling $20,000, given the costs facing defendants for their defense of plaintiff's action, as well as plaintiff's history of filing frivolous lawsuits, both in general and specifically as to the claims at issue in this action.

IV.

In her reply brief to this Court, plaintiff presents an additional argument, that Dalenko was denied due process and protection of the courts because of the trial court's "constant **606 intervention and redirecting [plaintiff's] attention away from her prepared, persuasive presentation," because the trial court challenged her allegations without reading the pleadings, and because the assistant clerk of court did not appoint a guardian ad litem for the prosecution of Dalenko's case. We have reviewed plaintiff's arguments as to the trial court's actions and conclude they are without merit. As to the appointment of a guardian ad litem, none of the assignments of error that plaintiff has listed as corresponding to her argument specifically addresses this issue, nor does any assignment of error of record pertaining to the Dalenko appeal. That issue is not properly before us, and these arguments are therefore overruled. *See, e.g., Mark IV Bev., Inc. v. Molson Breweries USA, Inc.*, 129 N.C.App. 476, 500 S.E.2d 439 (where assignment of error fails to correspond to issue presented, issue not properly presented for appellate consideration), *disc. review denied,* 349 N.C. 231, 515 S.E.2d 705 (1998).

*60 Plaintiff's individual appeal is dismissed; the orders dismissing the amended complaint as to Dalenko and requiring plaintiff to post prosecution bonds is affirmed. Dismissed in part; affirmed in part.

Chief Judge EAGLES and Judge GEER concur.

N.C.App.,2003.
Dalenko v. Wake County Dept. of Human Services
578 S.E.2d 599, 157 N.C.App. 49
(extracted from WestLaw)

APPENDIX B

(2) "ORDERS"

COA02-377
APRIL 1, 2003

NORTH CAROLINA COURT OF APPEALS
RALEIGH, NORTH CAROLINA

Plaintiffs: Estate of Louis Dalenko (deceased), by Personal Representative, Carol Bennett; (and) Carol Bennett, individually.

Defendants-Appellees' "Motions To Dismiss Appeal" (filed May 22, 2002) are allowed as to Bennett, individually, and denied as to Dalenko (Estate of).

No.COA02-377
North Carolina Court of Appeals
****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

From Wake (00CVS5994)

****

ORDER

The following order was entered:

The motion filed in this cause on the 22nd day of May 2002 and designated "Motion To Dismiss Appeal" is allowed as to Bennett's individual appeal, but denied as to the appeal on behalf of Dalenko. See opinion filed 1 April 2003.

By order of the Court this the 1st day of April 2003.

Witness my hand and official seal this the 1st day of April 2003.

s/ John H. Connell
John H. Connell
Clerk of North Carolina
Court of Appeals

cc:
Mr. Lou A. Newman
Ms. Carol Bennett
Ms. Corinne G. Russell

No.COA02-377
North Carolina Court of Appeals
****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

From Wake (00CVS5994)

****

ORDER

The following order was entered:

The motion filed in this cause on the 22nd day of May 2002 and designated "Motion To Dismiss Appeal" is allowed as to Bennett's individual appeal, but denied as to the appeal on behalf of Dalenko. See opinion filed 1 April 2003.

By order of the Court this the 1st day of April 2003.

Witness my hand and official seal this the 1st day of April 2003.

s/ John H. Connell
John H. Connell
Clerk of North Carolina
Court of Appeals

cc:
Ms. Corinne G. Russell
Ms. Carol Bennett
Mr. Lou A. Newman

APPENDIX C

(4) "ORDERS" *

COA02-377
APRIL 1, 2003

NORTH CAROLINA COURT OF APPEALS
RALEIGH, NORTH CAROLINA

Plaintiff: **Carol Bennett, individually**

Allowing Defendants-Appellees'
"Motions to Dismiss Appeal"
of Carol Bennett, individually:

filed by	date
Newman	8/19/02
Russell	8/19/02
R-N (joined)	9/03/02
R-N (joined)	9/13/02

*** (See App. I, "Orders" extending time)**

No.COA02-377
North Carolina Court of Appeals
****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

From Wake (00CVS5994)

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

FILED
03 APR-1 PM 2:43
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

ORDER

The following order was entered:

The motion filed in this cause on the 19th day of August 2002 and designated "Motion To Dismiss Appeal" is allowed.

By order of the Court this the 1st day of April 2003.

Witness my hand and official seal this the 1st day of April 2003.

s/ *John H. Connell*
John H. Connell
Clerk of North Carolina
Court of Appeals
(SEAL)

cc:
Mr. Lou A. Newman
Ms. Carol Bennett
Ms. Corinne G. Russell

No.COA02-377
North Carolina Court of Appeals
****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

From Wake (00CVS5994)

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

FILED
03 APR-1 PM 2:43
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

ORDER

The following order was entered:

The motion filed in this cause on the 19th day of August 2002 and designated "Motion To Dismiss Appeal" is allowed.

By order of the Court this the 1st day of April 2003.

Witness my hand and official seal this the 1st day of April 2003.

s/ *John H. Connell*
John H. Connell
Clerk of North Carolina
Court of Appeals
(SEAL)

cc:
Ms. Corinne G. Russell
Ms. Carol Bennett
Mr. Lou A. Newman

(APPENDIX C-2)

No.COA02-377
North Carolina Court of Appeals
****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

From Wake (00CVS5994)

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

FILED
03 APR-1 PM 2:43
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

ORDER

The following order was entered:

The motion filed in this cause on the 3rd day of September 2002 and designated "Motion To Dismiss Appeal And For Sanctions" is allowed as to Motion to Dismiss, but denied as to sanctions.

By order of the Court this the 1st day of April 2003.

Witness my hand and official seal this the 1st day of April 2003.

s/ John H. Connell
John H. Connell
Clerk of North Carolina
Court of Appeals
(SEAL)

cc:
Ms. Corinne G. Russell
Ms. Carol Bennett
Mr. Lou A. Newman

(APPENDIX C-3)

No.COA02-377

North Carolina Court of Appeals

****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

From Wake (00CVS5994)

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

FILED
03 APR-1 PM 2:43
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

ORDER

The following order was entered:

The motion filed in this cause on the 13rd day of September 2002 and designated "Motion To Dismiss Appeal" is allowed as to motion to dismiss; no sanctions will be awarded.

By order of the Court this the 1st day of April 2003.

Witness my hand and official seal this the 1st day of April 2003.

s/ *John H. Connell*
John H. Connell
Clerk of North Carolina
Court of Appeals
(SEAL)

cc:
Ms. Corinne G. Russell
Ms. Carol Bennett
Mr. Lou A. Newman

APPENDIX D

"ORDER"

00-CVS-5994
JUNE 27, 2001

JUDGE NARLEY L. CASHWELL
WAKE COUNTY SUPERIOR COURT
RALEIGH, NORTH CAROLINA

Plaintiff: Estate of Louis Dalenko (deceased), by Personal Representative, Carol Bennett

Denying Plaintiff's "Motion" and "Amendment to Motion For Leave To File Supplemental Amended Complaint" (Dalenko);

(and)

Allowing Defendants': Rule 12(b)(6) Motions to Dismiss Amended Complaint (Dalenko).

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY	SUPERIOR COURT DIVISION 00 CVS 05994
Louis Dalenko, an incompetent, by Interim General Guardian, Carol Bennett, and Carol Bennett, individually, Plaintiffs v. Wake County Department of Human Services, Thomas W. Hogan, Director*, and Susan Harmon, Social Worker and Individual, Lou A. Newman, a Professional; Defendants	FILED 01 JUN 27 PM 4:17 WAKE COUNTY,CSC ORDER

THESE MATTERS come before the Court by way of document entitled Amendment to Motion signed by Carol D. Bennett, dated June 25, 2001, and filed June 26, 2001, at 11:05 a.m., which is an attempt to amend the Motion for Leave to File Supplemental Amended Complaint signed by Carol D. Bennett and filed on May 14, 2001, at 4:13 p.m.; and motions of all Defendants pursuant to Rule 12(b)(6) of the Rules of Civil Procedure to dismiss the Amended Complaint and Request for Jury Trial dated January 25, 2001, signed by Carol D. Bennett and served on February 5, 2001.

Hearing on these matters was held on June 26, 2001, at which time the following persons appeared: Carol Bennett, personal representative for the Estate of Louis Dalenko; Corinne G. Russell, Deputy Wake County Attorney, representing Wake County Department of Human Services and Susan Harmon; and Lou A. Newman, Defendant/Attorney.

Upon review of the entire file, including the Amended Complaint dated January 25, 2001, signed by Carol D.

Bennett and the proposed Supplemental Amended Complaint dated [p. 2] May 14, 2001, and filed with the Motion for Leave to File Supplemental Amended Complaint; and after hearing argument from all present, this Court has determined, in its discretion, that the Amendment to Motion and Motion for Leave to File Supplemental Amended Complaint should be denied.

Reasons for the denial of the Motion for Leave to File Supplemental Amended Complaint include: (1) allowance of the amendment would be futile as the action would still be subject to dismissal for failure to state a claim upon which relief can be granted; (2) the proposed amendments and prior filings in this action fail and have failed to cure defects in the pleadings; and (3) undue delay would be caused by allowing such an amendment.

THEEFORE, IT IS HEREBY, ORDERED, ADJUDGED AND DECREED THAT:

1. The Amendment to Motion dated June 25, 2001, and filed June 26, 2001, is denied.

2. The Motion for Leave to File Supplemental Amended Complaint dated May 14, 2001, is denied.

3. The Amended Complaint and Request for Jury Trial dated January 25, 2001, is dismissed as to all Defendants pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

This the 27th day of June, 2001.

s/: Narley L Cashwell

Honorable Narley L. Cashwell
Superior Court Judge

(APPENDIX D-2)

APPENDIX E

"ORDER AWARDING PROSECUTION BONDS"

00-CVS-5994
JUNE 27, 2001

JUDGE NARLEY L. CASHWELL
WAKE COUNTY SUPERIOR COURT
RALEIGH, NORTH CAROLINA

Plaintiff: Estate of Louis Dalenko (deceased), by Personal Representative, Carol Bennett

Allowing Defendants' "Motions For Prosecution Bonds" (filed June 14, 2000 and August 2, 2000)

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY	SUPERIOR COURT DIVISION 00 CVS 05994
Louis Dalenko, an incompetent, by Interim General Guardian, Carol Bennett, and Carol Bennett, individually, Plaintiffs v. Wake County Department of Human Services, Thomas W. Hogan, Director*, and Susan Harmon, Social Worker and Individual, Lou A. Newman, a Professional; Defendants	FILED 01 JUN 27 PM 4:17 WAKE COUNTY,CSC ORDER AWARDING PROSECUTION BONDS

THIS MATTER COMES before this court by way of Motions for Prosecution Bond as to the Estate of Louis Dalenko, filed by Defendants Wake County Department of Human Services and Susan Harmon on June 14, 2000, and by Lou A. Newman on August 2, 2000. A hearing was held on April 30, 2001, before the Honorable Narley L. Cashwell, Judge Presiding, at which time the following persons appeared: Carol Bennett, Personal Representative for the Estate of Louis Dalenko; Corinne G. Russell, Deputy Wake County Attorney appearing for Defendants, Wake County Human Services and Susan Harmon; and Lou A. Newman, Defendant.

The Court took judicial notice of the following Wake County court files: 95-SP-1297, 95-CVD-3727, 97-CVS-4774, 98-CVS-8720, and 98-CVS-13072.

Based upon a review of the files and consideration of argument by the parties, this Court makes the following findings of fact:

FINDINGS OF FACT

1. That on November 16, 1998, Carol Bennett filed a lawsuit (98-CVS-13072) regarding a matter alleged to have

occurred on November 16, 1995, against all Defendants purporting to represent herself and her father, Louis Dalenko, an incompetent.

2. That Motions to Dismiss and Motions for Prosecution Bond were filed by all Defendants in 98-CVS-13072. [p. 2]

3. That on May 26, 2000, the date hearing was set for the Motions for Prosecution Bonds, Carol Bennett filed a Notice of Voluntary Dismissal without prejudice pursuant to Rule 41(a) on behalf of herself and Louis Dalenko.

4. That on June 28, 1999, Defendant Newman filed a Motion for Sanctions and Attorney's Fees pursuant to Rule11 of the North Carolina Rules of Civil Procedure and N.C.G.S. Section 6-21.5.

5. That by Order dated February 2, 2000, the Honorable Ronald L. Stephens found that Carol Bennett, in filing the action (98-CVS-13072) had failed to comply with the requirements of Rule 17(b)(1) of the Rules of Civil Procedure regarding an incompetent; that she had failed to state a claim; that there was a complete absence of justiciable issue of either law or fact raised by the Complaint; and that she had stated her intention to pursue the litigation in your voluntary dismissal. Additionally, Judge Stephens found that Plaintiff Carol Bennett had filed numerous lawsuits as a pro se plaintiff, has been sanctioned for filing baseless claims in other lawsuits, that she has familiarity with and understanding of the Rules of Civil Procedure and that she has the capacity and ability to understand the obligations under Rule 11. Judge Stephens ordered that Carol Bennett pay attorneys' fees to Defendant Lou A. Newman in the amount of $4500.00 for violation of Rule 11 and pursuant to N..G.S. 6-21.5.

6. That Plaintiff Carol Bennett has appealed the Febuay 2, 2000, Order of the Honorable Ronald L. Stephens to the North Carolina Court of Appeals.

7. That the instant action, based upon the same

claim as that contained within 98-CVS-13072, was filed on May 26, 2000, by Carol Bennett, purporting to represent herself and her father Louis Dalenko.

8. That Carol Bennett testified before Assistant Clerk of Court, Gilbert W. File, on June 23, 2000, in 95-SP-1297. Paragraph #49 of the Order of July 11, 2000, from that proceeding recites that she stated that she was considering dismissing the instant action as "numerous legal consultations resulted in advice against going forward because the action would take years to litigate, that the costs may exceed any benefit to Respondent's estate, and given the possibility of additional sanctions."

9. That Carol Bennett filed an appeal of the July 11, 2000, Order of the Honorable Gilbert W.File. The Order was affirmed on appeal by order of the Honorable James C.Spencer, dated and filed on February 21, 2001. Carol Bennett has filed a Motion to Reconsider, calendared for May 7, 2001, before Judge Spencer, as well as an appeal to the North Carolina Court of Appeals.

10. That Louis Dalenko died on January 5, 2001. Carol Bennett as Personal Representative of the Estate of Louis Dalenko was substituted for Louis Dalenko in this action [p. 3] by order dated February 21, 2001, and filed February 27, 2001, of the Honorable Henry W. Hight, Jr.

11. That Plaintiff Carol Bennett was ordered to post prosecution bonds in the amount of Five Thousand ($5000.00) Dollars for Defendant Newman and for Defendants Wake County Human Services and Harmon by order of the Honorable A. Leon Stanback, Jr., dated August 24, 2000.

12. That the Complaint of Plaintiff Carol Bennett in this action was dismissed by Order of Dismissal for Failure to Post Prosecution Bond of the Honorable Henry W.Hight, Jr., dated February 21, 2001, and filed on February 27, 2001, for failure to comply with the August 24, 2000, order to post prosecution bonds. The dismissal order was not appealed and the time to appeal has expired.

13. That Carol Bennett has a history of filing legal actions without benefit of legal counsel resulting in orders granting legal sanctions pursuant to Rule 11 and attorneys' fees pursuant to the North Carolina General Statute Section 6-21.5. That history includes the dismissal of another action for failure to pay sanctions imposed.

14. That the Court received verified Time Sheets from attorney Defendant Lou A. Newman and Deputy Wake County Attorney Corinne G. Russell, showing legal time expended prior to this hearing of 159.8 hours and 104 and 68/100 hours, respectively.

15. That substantial costs for depositions are foreseeable and likely given the lengthy pleadings filed should Carol Bennett proceed with this action.

16. That Ten Thousand Dollars ($10,000) is a minimum amount to secure Defendant Lou A. Newman for recovery of costs incurred in the defense of this lawsuit by Carol Bennett, Personal Representative for the Estate of Louis Dalenko.

17. That Ten Thousand Dollars ($10,000) is a minimum amount to secure Defendants Wake County Human Services and Susan Harmon for costs incurred in the defense of this lawsuit by Carol Bennett, Personal Representative for the Estate of Louis Dalenko.

18. That there is good cause to require Carol Bennett, Personal Representative of the Estate of Louis Dalenko, to pay into the Office of the Clerk of Superior Court, a cash prosecution bond pursuant to N.C.G.S. 1-109, and that such bond should be increased from the statutory amount as provided by North Carolina case law, of Ten Thousand ($10,000) Dollars as security for Defendant Lou A. Newman for costs in this action within ninety (90) days of entry of this order.

19. That there is good cause to require Carol Bennett, Personal Representative of the Estate of Louis Dalenko, to pay into the Office of the Clerk of Superior Court, a cash prosecution bond pursuant to N.C.G.S. 1-109,

and that such bond [p. 4] should be increased from the statutory amount as provided by North Carolina case law, of Ten Thousand ($10,000) Dollars as security for Defendants Wake County Human Services and Susan Harmon for costs in this action within ninety (90) days of entry of this order.

Based upon the foregoing findings of fact, this court concludes as a matter of law:

CONCLUSIONS OF LAW

1. That there is good cause to require Carol Bennett, Personal Representative of the Estate of Louis Dalenko, to pay into the Office of the Clerk of Superior Court, a cash prosecution bond pursuant to N.C.G.S. 1-109, of Ten Thousand ($10,000) Dollars as security for Defendant Lou A. Newman for costs in this action within ninety (90) days of entry of this oder.

2. That there is good cause to require Carol Bennett, Personal Representative of the Estate of Louis Dalenko, to pay into the Office of the Clerk of Superior Court, a cash prosecution bond pursuant to N.C.G.S. 1-109 of Ten Thousand ($10,000) Dollars as security for Defendants Wake County Human Services and Susan Harmon for costs in this action within ninety (90) days of entry of this order.

3. That Carol Bennett, Personal Representative fof the Estate of Louis Dalenko, must post the prosecution bonds, or appeal bonds in the same amounts, as a condition of proceeding with any appeal of this order prior to the final order in this action.

This the 27th day of June, 2001.

s/: Narley J Cashwell

Honorable Narley L. Cashwell
Superior Court Judge

(APPENDIEX E-5)

APPENDIX F

"ORDER GRANTING SANCTIONS AND ATTORNEY'S FEES"

00-CVS-5994
JUNE 27, 2001

JUDGE NARLEY L. CASHWELL
WAKE COUNTY SUPERIOR COURT
RALEIGH, NORTH CAROLINA

Plaintiff: Carol Bennett, individually

Allowing Defendants' (6)
"Motions for Sanctions"
against Carol Bennett:

filed by	date
Newman	10 Oct 00
Russell	08 Jan 01
Newman	10 Jan 01
Newman	30 Apr 01
Newman	30 Apr 01
Russell	02 Mar 01

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY	SUPERIOR COURT DIVISION 00 CVS 05994
Louis Dalenko, an incompetent, by Interim General Guardian, Carol Bennett, and Carol Bennett, individually, Plaintiffs v. Wake County Department of Human Services, Thomas W. Hogan, Director, and Susan Harmon, Social Worker and Individual, Lou A. Newman, a Professional; Defendants	FILED 01 JUN 27 PM 4:17 WAKE COUNTY,CSC ORDER GRANTING SANCTIONS AND ATTORNEY'S FEES

THIS CAUSE coming on to be heard and being heard before the undersigned Resident Superior Court Judge presiding at the April 30, 2001 civil session of the Superior Court of Wake County, Raleigh, North Carolina upon the Defendants', Wake County Department of Human Services and Susan Harmon (hereafter "WCDHS" and "Harmon"), Motions for Sanctions pursuant to N.C.G.S. 1A-1, Rule 11 and/or Requests for Attorney's Fees pursuant to N.C.G.S. 6-21.5, said Motions dated January 8, 2001 and March 2, 2001; and Motions of the Defendant, Lou Newman (hereafter "Newman"), for Sanctions pursuant to N.C.G.S. 1A-1, Rule 11 and/or Requests for Attorney's Fees pursuant to N.C.G.S. 6-21.5, said Motions dated October 10, 2000, January 10, 2001 and February 28, 2001. At said hearing the Defendants, WCDHS and Harmon, were represented by Deputy Wake County Attorney Corinne G. Russell; the Defendant Newman appeared *pro se*; and the Plaintiff, Carol Bennett (hereinafter "Bennett") appeared *pro se*.

At said hearing the Court heard the statements and arguments of Ms. Russell, of Ms. Newman, and of Ms.

Bennett. The Court also considered all pleadings, documents, materials and paperwritings filed of record and/or contained in the above numbered and captioned file, 00 CVS 5994. The Court also took judicial notice of all pleadings, orders, documents, materials and paperwritings filed of record and/or contained in the following court files maintained in the office of the Wake County Clerk of Superior Court: 95 Sp 1297, 95 CVD 3727, 97 CVS 4774, 98 CVS 8720 and 98 CVS 13072. The Court also considered and reviewed the following orders and/or pleadings from the foregoing court files as designated by file number and date of order: 95 CVD 3727 with date of orders/pleadings April 29, 1997, October 3, 1997 and May 20, 1998; 97 CVS 4774 with date of orders/pleadings November 20, 1998 and February 25,1999. The Court also considered and reviewed orders/pleadings dated January 26, 1996 and April 18, 1996 filed of record and/or contained in file number 95 CVS 3699, which matter is a Durham County proceeding and is maintained in the Office of the Durham County Clerk of Superior Court. The Court also received and considered a certified list of actions filed in the office of the Wake County Clerk of Superior Court wherein Carol Bennett is a party and a letter from Carol Bennett

to Lou Newman dated March 4, 2000. The Court also received time records from counsel for defendants reflecting time spent in the defense of this matter. All pleadings, orders, document, materials and paperwritings considered by the Court in ruling upon the Motions which are the subject of this Order are incorporated herein by reference in all respects as if fully set forth.

After a fully and fair consideration of the arguments of the parties and/or their counsel, a review of all documents and other materials presented at the hearing, a review of all referenced court files as noted above and all other files and documents of which this Court took judicial notice; and, this

Court finds and concludes as follows:

FINDINGS OF FACT

1. On November 16, 1998 in Wake County file number 98 CVS 13072 Bennett obtained an Order Extending Time to File Complaint and Civil Summons. Within her Application, Bennett purported to represent herself *pro se* and her father, Louis Dalenko,an incompetent pursuant to a durable power of attorney.

2. On December 7, 1998, Bennett filed a Complaint in Wake County file number 98 CVS 13072 again purporting to represent herself *pro se* and her father.

3. On February 12, 1999, Defendants, WCDHS and Harmon, file a Motion to Dismiss this Complaint pursuant to Rule 12(b)(6) and a Motion pursuant to N.C.G.S. 1-109 requiring Plaintiffs to post a prosecution bond to secure costs for those Defendants. This Motion for Prosecution Bond was calendared for hearing on May 26, 1999.

4. On March 10, 1999, the Defendant, Newman, filed a Motion to Dismiss this Complaint pursuant to Rule 12(b)(2),(4) and (6), and a Motion pursuant to N.C.G.S. 1-109 requiring Plaintiffs to post a prosecution bond to secure costs for Newman. Newman's Motion for Prosecution Bond was also calendared for hearing on May 26, 1999.

5. On May 26, 1999 Bennett filed a Notice of Voluntary Dismissal pursuant to Rule 41(a) of the Complaint in 98 CVS 13072 citing her need to "seek medical support from Florida doctors" as to her father's medical condition in 1995, her involvement in another lawsuit, her father's declining health, and her own physical condition. Bennett also stated in the Dismissal her position that "she" will be in a better position to re-file this matter within one (1) year as provided under Rule 41(a)."

6. On June 28, 1999 Newman filed a Motion for Sanctions pursuant to Rule 11 and a Request for Attorneys'

Fees pursuant to N.C.G.S. 6-21.5, which Motion and Request was duly served upon Bennett.

7. Following a hearing upon said Motion and Request on October 6, 1999 and by Order dated February 2, 2000, and filed of record on February 7, 2000, the Honorable Ronald L. Stephens, Superior Court Judge presiding granted Newman's Motion and Request and sanctioned Bennett by requiring Bennett to pay attorneys' fees to Newman in the amount of

$4500. Within a Memo to File dated December 16, 2000, and the Order dated February 2, 2000, Judge Stephens found and concluded that the action failed to state a claim upon which relief could be granted as to Newman, and that there was a complete lack of justiciable issue of either law or fact as to Newman, and that the award of attorney's fees to Newman was the proper sanction. The Order also recited that Bennett purported to be acting on behalf of Louis Dalenko, and that Rule 17(b)(1) required that her father, an incompetent, must appear through a general guardian or guardian *ad litem*. Judge Stephens denied the request of Wake County Department of Human Services for a "gatekeeper order" stating within paragraph # 21 of the February 7, 2000, Order that "the Court does not find basis at this time for the extraordinary relief of entry of a gatekeeper order ...."

8. Between the hearing on the Motion on October 6, 1999, and the entry of Judge Stephens' Order on February 7, 2000, Bennett either filed with the Wake County Clerk of Superior Court in file 98 CVS 13072 and/or mailed directly to Judge Stephens, the following eight documents: a letter to Shelly T. Eason, Deputy Wake County Attorney, dated October 7, 1999; a Notice of Objections to Statement of Attorney's Fees and to Motion for Sanctions and Motion for Gatekeeper Order dated October 7 or 8, 1999; a Memorandum to the Hearing in Opposition to Defs Motion and Request for Findings of Fact (and as proposed

Amendments to Complaint) dated October 7 or 8, 1999; a letter to Newman dated December 21, 1999; a Plaintiff's Motion to Reconsider dated January 10, 2000; a Plaintiff's Request for Findings of Fact with attached documents and Exhibits dated January 10, 2000; an alternative proposed Order to Judge Stephens dated January 12, 2000; and a calendar request to the Durham County Trial Court Administrator dated January 12, 2000.

9. After the entry of the Order by Judge Stephens on February 7, 2000, Bennett filed with the Wake County Clerk of Superior Court, mailed directly to Judge Stephens, and /or filed with the North Carolina Court of Appeals the following six documents related to 98 CVS 13072: a Motion to Amend Judgment dated February 17, 2000; a proposed Amendments to Order dated February 17, 2000; a Motion for Temporary Stay and Petition for Writ of Supersedeas to the North Carolina Court of Appeals dated March 7, 2000; a letter to Judge Stephens dated March 7, 2000, requesting meeting or hearing on her Motion to Amend Judgment. The North Carolina Court of Appeals granted a temporary stay of the order on March 8,m 2000, but dissolved the stay and denied the Petition for Writ of Supersedeas on March 23, 2000.

10. Bennett's appeal in 98 CVS 17032 is currently pending before the North Carolina Court of Appeals for decision. Defendants, joined for the appeal, filed a Motion to Dismiss the appeal for failure of Bennett to comply with the order of the North Carolina Court of Appeals regarding the filing of Bennett's brief. That Motion for Dismissal was referred to the appellate panel of assigned to determine the appeal.

11. In Wake County file 95 SP 1297 by Application dated May 25, 2000 and filed of record on May 26, 2000, Bennett sought appointment as general guardian for her father, Louis Dalenko. An Order was issued by Gilbert File, Assistant Clerk of Superior Court, on May 26, 2000, appointing Bennett as Interim General Guardian solely for

the purpose of filing a lawsuit

on behalf of her father. The Order reflects that Kevin P. Hopper, Carol Bennett's attorney, had represented to Mr. File that the statute of limitations for filing the lawsuit would expire on May 26, 2000, and therefore a general guardian needed to be appointed immediately to preserve the incompetent's claims.

12. The instant action, Wake County file 00 CVS 5994, was instituted by Bennett upon the filing of a Complaint and Demand for Jury Trial on May 26, 2000, with the issuance of Summons for the same individuals o public entities as were the Defendants in the action previously referenced in Wake County file 98 CVS 13072. Bennett alleges the Interim General Guardian appointment of May 26, 2000, as well as he durable power of attorney, as her authority to represent her father. Bennett did not seek to have this Complaint and Summonses served.

13. In 95 SP 1297, after a hearing on June 23, 2000, and by written Order dated July 11, 2000 Gilbert W. file, Assistant Clerk of Superior Court, vacated his May 26, 2000 Order appointing Bennett as Interim General Guardian. Within paragraph 37 of the July 11 Order Mr. File found as a fact that "counsel for Ms. Bennett failed to convey to the Court all the facts necessary to make an informed decision" regarding the appointment of the interim general guardian. Mr. File found in Paragraph 38 that Bennett's "procrastination or negligence does not constitute an emergency to Respondent's estate requiring the Court's immediate intervention." File further found that Bennett's *ex parte* motion to be appointed general guardian under those circumstances was "an abuse of legal process." Paragraph 49 of said Order reflects that Bennett testified at the hearing that she had taken no steps to serve Newman "pending review by her attorney of the merits of proceeding with the action," and she was considering dismissing the instant case as "numerous legal consultations" had resulted in advice against going

forward with the litigation for reasons which included "the possibility of additional sanctions." Assistant Clerk File also found that Bennett was not a fit and proper person to be appointed general guardian for her father, and appointed Robert E. Monroe as guardian of the estate for Louis Dalenko.

14. Over the objections of Newman and counsel for Wake County Department of Human Services at the hearing on July 28, 2000, and by Order dated August 7, 2000, Assistant Clerk File allowed Attorney Kevin Hopper to withdraw from his representation of Bennett in 95 SP 1297. Findings within that Order include:

> Ms. Bennett further stated that she believes that it is her legal right to proceed *pro se*, and that she wishes to do so at this time while reserving her right to retain counsel on a consulting basis or by formal representation at a later date;
>
> Ms. Bennett stated that she does not believe that Rule 11 sanctions are proper in this matter; however, she acknowledged that any time a party signs pleadings or motions *pro se*, that party has submitted herself to the requirements of the North Carolina Rules of Civil Procedure, including Rule 11; and
>
> The Court advised Ms. Bennett that legal representation would be advisable, otherwise she would be proceeding at her peril.

15. After the entry of the July 11, 2000 Order of Assistant Clerk File in 95 SP 1297, Bennett filed the following eight documents: a Motion to Amend Ode - Findings of Fact- [N..G.S. 1A-1, Rule 60(a), Rule 52(b)]; a Motion to Reconsider and Vacate Order pursuant to Rule 59(a)(1), (7), (8) and (9) and Rule 60(b)(5-6); a Notice of Appeal and Request for Hearing Before a Jury; a Motion for

Stay of Proceedings; a letter to Gilbert File dated July 31, 2000 stating that she was withdrawing her to Reconsider and a Motion to Amend Findings of Fact; a Notice of Notice of Withdrawal of Motion to Reconsider within which she "refers her motion to Amend Order (Findings of Fact) to in-chambers consideration;" calendar request for jury trial; and a Notice of Appeal to Superior Court of the Honorable Gilbert W. File's denial of her motions for stay and to appoint a guardian *ad litem* for her father.

16. Following a hearing on September 18, 2000, the Honorable James C. Spencer, Superior Court Judge presiding, issued a written Order dated September 22, 2000, in which Judge Spencer ruled that the appeal from the Clerk's rulings in 95 SP 1297 was not to be heard by a jury but would be upon judicial revew of the record as provided for by law. At that hearing, Bennett presented a written Request for Trial De Novo by Jury dated September 18, 2000, and Verified Statement of Facts dated September 18, 2000. On October 2, 2000, Bennett filed a Notice of Objections.

17. On December 4, 2000 Judge Spencer conducted a hearing upon Bennett' appeal and thereafter took the matte under advisement. On January 9, 2001, Bennett filed a Notice of Termination of Guardianships and Revocation of General Power of Attorney asserting the death of Mr. Dalenko on January 5, 2001. On February 21, 2000, Judge Spence entered an Order affirming the rulings of the Clerk.

18. On March 22, 2001, Bennett filed and mailed to Judge Spencer a Motion to Reconsider citing Rule 60(b)(4). Bennett also filed a Notice of Appeal with the North Carolina Court of Appeals on March 22, 2001, and a Motion to Extend Time to Serve Proposed Record on Appeal on April 16, 2001, which Motion was granted. On April 26, 2001, Bennett filed a Notice of Hearing which purported to Amend the Motion to Reconsider to include a cite to Rule 60(b)(6). Hearing on that matter was noticed for May 7,

2001.

19. On June 14, 2000, even though Bennett did not seek to have WCDHS and Harmon served the Complaint in 00 CVS 594, those two Defendant submitted themselves to the jurisdiction of the court by filing Motions to Dismiss and for Prosecution Bond and noticed a hearing on the Motion for Prosecution Bond for the week of August 21, 2000.

20. On July 14, 2000 Bennett filed a Notice of Change of Party Status. Bennett also made three requests for the appointment of a guardian *ad litem* for Mr. Dalenko which requests were denied by Assistant Clerk File, by Order dated July 31, 2000, upon the basis that the guardian of the estate, Robert E. Monroe, was the person who should determine the efficacy of proceeding with this lawsuit on behalf of Mr. Dalenko.

21. On August 2, 2000, Newman filed Motions to Dismiss and for Prosecution Bond and noticed said Motions for hearing on August 21, 2000.

22. At the August 21, 2000 hearing, the Honorable A. Leon Stanback, Superior Court Judge presiding announced his decision to grant the Motion and to impose prosecution bonds totaling $10,000.00. Before the written Order, dated August 24, 2000, was signed and entered in file 00 CS 5994, Bennett filed with the Wake County Clerk of Superior Court, mailed directly to Judge Stanback and/or filed with the North Carolina Court of Appeals the following three documents: a Motion for Appointment of Guardian ad Litem for Plaintiff dated June 30, 2000, but filed and served August 23, 2000; a Motion to Reconsider and (or) New Hearing and Request for Judicial Preparation of All Orders and Judgments (Motion in the Cause) filed August 25, 2000.

23. After Judge Stanback's Order was filed of record on August 25, 2000, Bennett filed with the Wake County Clerk of Superior Court and served the following seven documents: a Notice of Objections to Proposed Order Denying Motion to Reconsider; a calendar request for

hearing on the motion to reconsider; a Notice of Appeal to the North Carolina Court of Appeals of Judge Stanback's order; a Motion for Stay in Superior Court, which Motion was thereafter denied by Order of Judge Stanback dated October 25, 2000; a Response to Defendants' Letter to the Court which letter requested Judge Stanback to sign the Order which Judge Stanback had instructed Defendants' counsel to prepare in ruling upon Bennett's August 23, 2000, Motion to Reconsider; Exhibits to Motion to Reconsider (Proposed Amended Order); and a Listing of Documents prepared 11/06/2000.

24. Newman filed a Motion to Dismiss the Motion to Reconsider and Motion for Sanctions on October 10, 2000 wherein Newman sought the imposition of sanctions against Bennett for the filing of the August 23 Motion. This October 10, 2000 Motion is a subject of this Order.

25. Bennett's Motion to Reconsider and (or) New Hearing and Request for Judicial Preparation of All Orders and Judgments (Motion in the Cause) filed August 23, 2000, and Amendment and Memorandum to "Motion to Reconsider" filed August 25, 2000 neither contain nor assert any allegations or claims sufficient to support granting of relief pursuant to Rule 59 either as a matter of law or in the Court's discretion.

26. On November 13, 2000, WCDHS and Harmon filed a Motion to Dismiss Bennett's appeal of the Order granting the prosecution bonds wherein Bennett's failure to comply with the Rules of Appellate Procedure was cited. After receipt of the Motion and the Notice of Hearing for December 11, 2000 , Bennett filed the following four documents: a Notice of Transcript Request & Certificate of Service of Transcript; a Response to Motion to Dismiss Appeal; a Notice of Withdrawal of Hearing with accompanying FAX MEMO to the Trial Court Administrator's Office advising that the "Trial Court ... lacks jurisdiction to hear the defendants' Motions to Dismiss" appeal; and a FAX MEMO to Trial Court Administrator

reciting that Bennett did not attempt to remove the motion to dismiss appeal from the calendar.

27. After a hearing on December 11, 2000 Judge Stanback issued a written Order dated December 14, 2000 dismissing Bennett's appeal of the Order awarding Prosecution

Bonds. After the hearing, Bennett filed the following three documents: a Notice of Appeal to the North Carolina Court of Appeals of the Orders of the Honorable A. Leon Stanback dismissing Plaintiff's Appeal and Denying Bennett's Rule 59 Motion to Reconsider the Prosecution Bond; a Motion to Vacate Order (and) Request for Judicial Settlement of Record on Appeal; and a Notice of Withdrawal without prejudice of her Notice of Appeal.

28. On January 8, 2001 WCDHS and Harmon filed a Motion for Sanctions pursuant to Rule 11 for the filing of the Motion to Vacate Order (and) Request for Judicial Settlement of Record on Appeal. This January 8m, 2001 Motion is a subject of this Order.

29. On January 10, 2001, Newman filed a Motion for Sanctions pursuant to Rule 11 for the filing of the Motion to Vacate Order " (and) Request for Judicial Settlement of Record on Appeal. This January 8, 2001 Motion is a subject of this Order.

30. Bennett's Motion to Vacate Order (and) Request for Judicial Settlement of Record on Appeal filed December 23, 2000 and amended February 6, 2001 neither contains nor asserts any allegations or claims sufficient to support granting of relief pursuant to Rule 60(b)(4) and/or pursuant to Rule 52(b) either as a matter of law or in the Court's discretion.

31. Bennett's references to the Code of Judicial Conduct within the Motion to Vacate Order (and) Request for Judicial Settlement of Record on Appeal filed December 23, 2000 and amended February 6, 2001 were made for the improper purpose of attempted intimidation of that Court.

32. There was no basis in law or fact to support Bennett's Motion to Vacate Order (and) Request for Judicial Settlement of Record on Appeal filed December 23, 2000 and amended February 6, 2001 because the appeal for which Bennett sought judicial settlement of the record had been dismissed.

33. The Honorable Henry W. Hight, Jr., Superior Court Judge presiding, by Order dated February 21, 2001, and filed of record on February 27, 2001 dismissed the action of Bennett as to all Defendants for the failure to post the prosecution bond.

34. All Motions filed by Bennett seeking Reconsideration of Orders filed in 00 CVS 5994 have been ruled upon and dismissed.

35. On February 28, 2001 Newman filed a Motion for Sanctions and a Request for Attorney's Fees pursuant to Rule 11 and N.C.G.S. 6-21.5 against Bennett. This February 28, 2001 Motion and Request is a subject of this Order.

36. On March 2, 2001 WCDHS and Harmon filed a Motion for Sanctions and a Request for Attorney's Fees pursuant to Rule 11 and N.C.G.S. 6-21.5 against all Plaintiffs. This March 2, 2001 Motion and Request as it pertains to Bennett is a subject of this Order.

37. Bennett stated to this Court that she had filed Motions to Reconsider without regard to the legal or factual validity of said Motions and knowing said Motions were without a

legal or factual basis as a method of getting additional documents into a record on appeal. Bennett stated that, as the Motions were without merit, she would expect them to be denied without hearing, therefore requiring little expenditure of time by the adverse parties, and resulting in only a small sanction award. Bennett further stated that an attorney, whom Bennett declined to name in response to this Court's request, had advised Bennett to take this course of action. Bennett was unable to state any legal or factual basis for the

Motions to Reconsider she has filed stating only that she thought it was a matter of "common courtesy." that she be allowed additional opportunity to be heard after hearing and decision on a Motion.

38. Bennett has been sanctioned by at least four separate Superior Court Judges and one District Court Judge in five different and distinct legal actions by Orders which have not been overturned, reversed or remanded by any appellate court. Bennett has exhibited a pattern of conduct in legal preceedings and a disregard for the rules of law and procedure which, if Bennett were licensed as an attorney, would require and demand reporting her to the North Carolina State Bar questioning her fitness to practice.

39. Bennett repeatedly indicated in her arguments to this Court that she did not know what she was doing when she first began to file lawsuits as a *pro se* litigant, inluding stating that she did not even know what the General Statutes were. Bennett stated that she has learned a lot as she is "reading the law" and now considers herself competent to represent herself and the estate of Louis Dalenko. Bennett stated she confers with attorneys regarding the pleadings or Motions she files but that she does not retain them. Bennett admitted during her arguments that she violated Rule 8(a)(2) of the North Carolina Rules of Civil Procedure in the Amended Complaint she filed on February 5, 2001. Bennett also requested a continuance of the Motion to Dismiss as to the Estate of Louis Dalenko because she wishes to file a Supplemental Complaint on behalf of the Estate of Louis Dalenko even though the Amended Complaint had been recently filed. Bennett has previously filed Complaints purporting to represent Louis Dalenko on the underlying instant claim on November 16, 1998; May 26, 2000, and February 5, 2001, totaling 74 pages.

40. In responding to Defendants' request for a "gatekeeper" order, Bennett stated to this Court that "sanctions are the way to keep *pro se* litigants out of the courtroom if they can't get the procedures right." Bennett

further stated that if pro se litigants can not handle motions, they probably will not be able to handle an appeal.

41. Bennett stated to this Court that she did not see any reason that discovery would be extensive in this matter, despite the numerous allegations involving legal and medical matters. During her statements, Bennett disregarded the need of Defendants to do discovery.

42. The Complaint, dated May 26, 2000, and Amended Complaint, dated January 25, 2001, filed by Bennett are frivolous and do not present any justiciable issues of law or fact as to any Defendants. The face of the pleadings reflect a failure of the Complaint to contain any assertions or allegations necessary to avoid dismissal pursuant to Rule 12(b)(6) and Rule 41(b) on the basis of various immunities of all Defendants, the statute of limitations for some allegations, and violations of the Rules of Civil Procedure. A less drastic sanction than dismissal for violation of the Rules of Civil Procedure would not be appropriate in view of the facts and circumstances of the case and the position of the parties.

43. The intentional failure of Bennett to seek service of the Complaint constitutes a violation of Rule 11 as it caused unnecessary delay and increased costs of litigation.

44. The multiple filings of Bennett in this matter, including the Complaint and Amended Complaint, are frivolous, have no basis in procedural or substantive law, reflect a failure of Bennett to investigate the law or facts, and have been interposed for the improper purposes of harassment and to cause unnecessary delay and increased costs of litigation;

45. The filings of Bennett in this action, and other actions, demonstrate she has not been able to represent herself *pro se*, or the estate of Louis Dalenko as personal representative, *pro se*, without violating Rule 11 of the Rules of Civil Procedure;

46. Bennett is competent to understand the

requirements of Rule 11 and the implications of its violations, but that she has persisted in those violations in this action as well as in other actions. During her argument to this Court Bennett repeatedly stated that she did not "intend" to violate Rule 11and that she did not believe that the past actions for which she has been sanctions constituted violations of Rule 11.

47. The history of litigation by Bennett as a *pro se* litigant in both this matter and the cases judicially noticed by this Court, demonstrate that Bennett is either unable or unwilling to follow the requirements of North Carolina law, including the North Carolina Rules of Civil Procedure. Bennett has filed baseless claims which have been dismissed under Rule 12(b)(6), as well as for failure to follow Orders of the Court. Bennett has continued to file Motions after having Motions filed on the same basis denied, and after being sanctioned therefore. Bennett's statements and actions have shown that Bennett has filed baseless claims and Motions fo the improper purpose of harassing adverse parties, costing them unnecessary time and expense in responding to her filings. In addition, Bennett has placed an undue burden on the judicial system, causing expense of time to numerous District and Superior Court Judges and by employees of the Clerk of Superior Court, the Trial Court Administrator, Judicial Assistants, and court reporters. This undue burden includes Orange County personnel, as Bennett calendared a matter in this case in Orange County without consent of the parties or of the Court.

48. It is burdensome for opposing parties to receive and/or respond to the filings of Bennett and these filings have the purpose and effect of harassment, delay and needless increase in costs of litigation.

49. Contact by Bennett with the staff of the Office of the Clerk of Superior Court of Wake County and with the staff of the Office of the Wake County Trial Court Administrator precipitated by her multiple filings and requests of the Wake County Courts are burdensome on those

offices and their personnel.

50. The repeated abuse of legal process by Bennett requires that special limitations be placed upon her access to the Wake County Courts. This Court has the inherent power to impose such special limitations as are reasonably necessary for the proper administration of justice and to provide solutions which enable the process of litigation to proceed smoothly. Aspects of that

power include the authority to regulate and discipline those persons who appear before the Court to prevent impropriety and to fashion a remedy to meet the circumstances of each case. The circumstances of this case, and other cases litigated by Carol Bennett *pro se*, are extraordinary.

51. Imposition of sanctions on Bennett pursuant to Rule 11 of the North Carolina Rules of Civil Procedure pursuant to N.C.G.S. 6-21.5, for the filing of the Complaint, dated May 26, 2000, and Amended Complaint and Demand for Jury Trial, dated January 25, 2001, is an appropriate remedy in this matter.

52. Entry of an Order requiring Bennett as an individual, to pay attorney's fees for all Defendants pursuant to N.C.G.S. 6-21.5, for the filing of the Complaint, dated May 26, 2000, and Amended Complaint and Demand for Jury Trial, dated January 25, 2001, is an appropriate remedy in this matter.

53. This Court takes judicial notice of the fact that both Deputy Wake County Attorney Corinne G. Russell and attorney Lou A. Newman each have twenty (20) years of legal and litigation experience which is also evidenced by their North Carolina Bar numbers, 8251 and 9386 respectively. This Court further takes judicial notice that Wake County attorneys with similar experience and education practicing before this Court typically charge between $150.00 to $250.00 per hour.

54. Newman has expended 159.8 hours in responding to the multiple filings of Bennett in this matter

and for preparation for this hearing. An addition 5.25 hours were expended during this hearing. $16,500.00 is a reasonable amount to order to be paid by Bennett to Newman as sanctions and attorneys' fees pursuant to Rule 11 and N.C.G.S.6-21.5.

55. Corinne G. Russell has expended 104.68 hours in responding to the multiple filings of Bennett in this matter and for preparation for this hearing. An additional 5.25 hours were expended during this hearing. $10,900.00 is a reasonable amount to order to be paid by Bennett to the County of Wake as sanctions and attorneys' fees for the legal services of Deputy Wake County Attorney Corinne G. Russell pursuant to Rule 11 and N.C.G.S. 6-21.5.

56. Entry of an Order which provides that so long as Bennett does not qualify as an indigent pursuant to N.C.G.S. 1-110, Bennett shall not file, or attempt to file, any document with the Office of the Clerk of Superior Court of Wake County which document does not contain a certification by an attorney licensed under the laws of the State of North Carolina to practice law in North Carolina that in the opinion of that attorney the document sought to be filed complies with Rule 11 of the Rules of Civil Procedure is an appropriate extraordinary remedy in this matter. It is reasonable and necessary that the certification shall also contain a recitation that the attorney has read and is award of the requirements of the instant Order. It is reasonable and necessary that the sanction for violation of this requirement be the dismissal or striking of the pleading or pleadings and denial of the motion or motions.

57. A violation of this Order being subject to punishment as provided by law for criminal and/or civil contempt is reasonable and necessary.

58. Entry of an Order requiring Bennett to post an appeal bond equal to the amount of

sanctions and attorneys' fees imposed by this Order as a condition of proceeding with any appeal of this Order is

reasonable and necessary

Based upon the foregoing findings of fact, this Court concludes as a matter of law:

CONCLUSIONS OF LAW

1. The Complaint dated May 26, 2000, and Amended Complaint dated January 25, 2001, filed by Bennett do not present a justiciable issue of law o fact as to any Defendants.

2. The multiple filings of Bennett in this matte are frivolous, have no basis in fact or in procedural or substantive law, and have been interposed for the improper purposes of harassment and to cause unnecessary delay and increased costs of litigation;

3. The filings of Bennett in this action, and other actions, demonstrate Bennett has not been able to represent herself *pro se*, or the estate of Louis Dalenko as personal representative, *pro se*, without violating Rule 11 of the Rules of Civil Procedure;

4. Bennett is competent to understand the requirements of Rule 11 and the implications of its violations, however Bennett has persisted in those violations in this action as well s in other actions.

5. The circumstances created by Bennett's *pro se* representation require extraordinary solutions.

6. Opposing parties having to receive and/or to respond to the filings of Bennett is burdensome, and the filings have the purpose and effect of harassment, delay and needless increase in costs of litigation;

7. Contact by Bennett with the staff of the Office of the Clerk of Wake County Superior Court and with the staff of the Office of the Wake County Trial Court Administrator precipitated by her multiple filings and requests of the courts of Wake County are burdensome on those offices and their personnel;

8. The repeated abuse of legal process by Bennett requires that special limitations be placed upon Bennett's access to the courts of Wake County;

9. Imposition of sanctions on Bennett pursuant to Rule 11 of the North Carolina Rules of Civil Procedure in the form of an award of attorneys' fees for all Defendants is an appropriate remedy in this matter.

10. Entry of an Order requiring Bennett as an individual, to pay attorneys' fees for all Defendants pursuant to N.C.G.S. 6-21.5, for the filing of the Complaint dated May 26, 2000, and Amended Complaint and Demand For Jury Trial dated January 25, 2001, is an appropriate remedy in this matter.

11. $16,500.00 is a reasonable amount to be paid by Carol Bennett to Lou A. Newman as sanctions and attorneys' fees pursuant to Rule 11 and N.C.G.S. 6-21.5.

12. $10,900.00 is a reasonable amount to be paid by Carol Bennett to the County of Wake as sanctions and attorneys' fees for the legal services of Deputy Wake County Attorney Corinne G. Russell pursuant to Rule 11 and N.C.G.S. 6-21.5.

13. Entry of an Order which provides that so long as Carol Bennett does not qualify as an indigent pursuant to N.C.G.S. 1-110, Bennett shall not file, or attempt to file, any document with the Office of the Clerk of Superior Court of Wake County which document does not contain a certification by an attorney licensed under the laws of the State of North Carolina to practice law in North Carolina that in the opinion of that attorney the document sought to be filed complies with Rule 11 of the Rules of Civil Procedure is an appropriate extraordinary remedy in this matter. It is reasonable and necessary that the certification shall also contain a recitation that the attorney has read and is aware of the requirements of the instant Order. It is reasonable and necessary that the sanction for a failure to comply with this requirement be the dismissal or striking of the pleading or

pleadings and denial of the motion or motions.

14. A violation of this Order being subject to punishment as provided by law for criminal and/or civil contempt is reasonable and necessary.

15. Entry of an Order requiring Bennett to post an appeal bond equal to the amount of sanctions and attorneys' fees imposed by this Order as a condition of proceeding with any appeal of this Order is reasonable and necessary.

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. The Complaint dated May 26, 2000, and Amended Complaint dated January 25, 2001, filed by Carol Bennett do not present a justiciable issue of law or fact as to any defendants.

2. The multiple filings of Carol Bennett in this matter are frivolous, have no basis in fact or in procedural or substantive law, and have been interposed for the improper purposes of harassment and to cause unnecessary delay and increased costs of litigation;

3. Carol Bennett shall pay $16,500.00 to Lou A. Newman as sanctions and attorney's fees pursuant to Rule 11 and N.C.G.S. 6-21.5, within ninety (90) days of the entry of this Order.

4. Carol Bennett shall pay $10,900.00 to the County of Wake as sanctions and attorney's fees for the legal services of Deputy Wake County Attorney Corinne G. Russell pursuant to Rule 11 and N.C.G.S. 6-21.5, within ninety (90) days of the entry of this Order.

5. So long as Carol Bennett does not qualify as an indigent pursuant to N.C.G.S. 1-110, Carol Bennett shall not file, or attempt to file, any documents with the Office of the Clerk of Superior Court of Wake County unless such document contains a certification by an attorney

licensed under the laws of the State of North Carolina to practice law in North Carolina that in the opinion of that

attorney the document complies with Rule 11 of the Rules of Civil Procedure. The certification shall also contain a recitation that the attorney has read and is aware of the requirements of this Order. A failure to comply with the certification requirements as set forth herein shall result in the dismissal or striking of the pleading or pleadings and the denial of the motion or motions.

6. The restrictions contained herein shall be as to all filings in Wake County, not just initial filings.

7. Violation of this Order by Carol Bennett, or anyone on her behalf, shall be punishable by criminal and/or civil.

8. That judgment is hereby entered for Lou A. Newman against Plaintiff Carol Bennett in the aforesaid amount of sanctions and attorneys' fees in the amount of $16,500.00. Said amount shall be paid in full o bond shall be posted in the amount of said sum as a condition of Carol Bennett's proceeding with any appeal of this Order.

9. That judgment is hereby entered for the County of Wake against Carol Bennett in the aforesaid amount of sanctions and attorneys' fees in the amount of $10,900.00. Said amount shall be paid in full or bond shall be posted in the amount of said sum as a condition of ff Carol Bennett's proceeding with any appeal of this Order.

This the *27th* day of June, 2001.

s/ Narley L. Cashwell
Narley L. Cashwell
Resident Superior Court Judge
Presiding

APPENDIX G

"ORDERS"

No. 240P-03
AUGUST 26, 2003

Reported: 585 S.E.2d 386, 357 N.C. 458 (2003).
Prior Report: 157 N.C.App. 49, 578 S.E.2d 599 (2003).

JUDGE BRADY
SUPREME COURT OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

Plaintiffs: Estate of Louis DALENKO (deceased), by Personal Representative, Carol Bennett; (and) Carol BENNETT, individually

Denying Plaintiffs':
"Petition For Discretionary Review" (Bennett);
"Notice of Appeal" (Bennett, Dalenko) *;
"Petition For Writ of Certiorari" (Dalenko);
"Motion For Meaningful Reconsideration" (Bennett);
(and)
"Petition For Writ of Certiorari"
from (6) Orders (Bennett).

* Allowing Defendants "Motion To Dismiss Appeal"

From decisions of the
NORTH CAROLINA COURT OF APPEALS
(COA02-377)

SUPREME COURT OF NORTH CAROLINA

****

(Dalenko and Bennett v. Wake Co. DHS)

Louis DALENKO, an incompetent by Interim General Guardian, Carol Bennett and CAROL BENNETT, individually

v.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, Thomas W. Hogan, Director, and Susan Harmon, Social Worker and Individual, Lou A. Newman, a Professional.

From NC Court of Appeals
(COA02-377)
From Wake
(00CVS5994)

****

ORDER

Upon consideration of the petition filed by Plaintiffs in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 21st day of August 2003.

s/ Brady, J.
For the Court"

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiffs in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendants, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 21st day of August 2003.

s/ Brady, J.
For the Court"

Upon consideration of the petition filed by Plaintiff (Carol Bennett) in this matter for a writ of certiorari to review the Order of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 21st day of August 2003.

s/ Brady, J.
For the Court"

Upon consideration of the petition filed by Plaintiff (Louis Dalenko Estate by Carol Bennett) in this matter for a writ of certiorari to review the Order of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 21st day of August 2003.

s/ Brady,J.
For the Court"

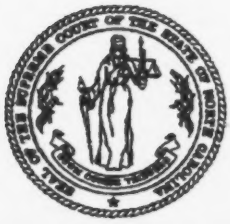
WITNESS my hand and the seal of the Supreme Court of North Carolina, this the **26th day of August 2003**.

Christie Speir Cameron
Clerk of Supreme Court

Carol B. Templeton
Assistant Clerk

(APPENDIX G-2)

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Court Reporter
Ms. Carol D. Bennett
Ms. Corinne G. Russell, Deputy Wake Coutny Attorney,
For Wake Coutny Attorneys Office
Ms. Lou A. Newman, Attorney at Law
West Publishing Company
Lexis-Nexis
LOIS Law



SUPREME COURT OF NORTH CAROLINA
CHRISTIE SPEIR CAMERON, Clerk

Fax: (919) 733-0105 Justice Building, 2E. Morgan Street Mailing Address:
Web: www.nccourts.org Raleigh, N C 27601 P.O. Box 2170
(919) 733-3723 Raleigh, NC 27602

7 October 2003

Ms. Carol D. Bennett
1709 Horton Road
Knightdale, NC 27545

From NC Court of Appeals
(COA02-377)
FromWake (00CVS5994)

Re: Dalenko and Bennett v Wake Co. DHS – No. 240P03

Dear Ms. Bennett:

Motion by Plaintiff (Carol Bennett) for Meaningful Reconsideration (Rules 2 and 37, N.C.R. App. P.) has been filed and the following order entered:

"Motion Denied by order of the Court in conference this the 1st day of October 2003.

s/ Brady, J.
For the Court"

Very truly yours,

Christie Speir Cameron
Clerk of Supreme Court

Carol B. Templeton
Assistant Clerk

(APPENDIX G-4)

Copy to:
West Publishing
Lexis-Nexis
LOIS Law
Mr. Ralph A. White, Appellate Court Reporter
Ms. Corinne G. Russell, Deputy Wake County Attorney,
For Wake County Attorneys Office
Ms. Lou A. Newman, Attorney at Law

APPENDIX H

"ORDERS"

No. 240P-03
AUGUST 18, 2003

Reported: 578 S.E.2d 599, --- N.C. --- (2003)

JUDGE BRADY
SUPREME COURT OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

Plaintiff: Bennett, individually

Denying Plaintiff's:
"Petition For Writ Of Supersedeas"
"Motion For Temporary Stay"
(from Superior Court injunction)

From decisions of the
NORTH CAROLINA COURT OF APPEALS
(COA02-377)

No.240P03

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Dalenko and Bennett v. Wake Co. DHS)

Louis DALENKO, an incompetent by Interim General Guardian, Carol Bennett and CAROL BENNETT, individually

v.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, Thomas W. Hogan, Director, and Susan Harmon, Social Worker and Individual, Lou A. Newman, a Professional.

From NC Court of Appeals
(COA02-377)
From Wake
(00CVS5994)

****

ORDER

Upon consideration of the petition filed by Plaintiff for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 18th day of August 2003.

s/ Brady, J.
For the Court"

Upon consideration of the petition filed by Plaintiff in this matter for a writ of mandamus, the following order was entered and is hereby certified to the Superior Court, Wake County:

"Denied by order of the Court in Conference, this the 18th day of August 2003.

(APPENDIX H-1)

s/ Brady, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of August 2003.

Christie Speir Cameron
Clerk of Supreme Court

Carol B. Templeton
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Court Reporter
Ms. Carol D. Bennett
Ms. Corinne G. Russell, Deputy Wake Coutny Attorney,
For Wake Coutny Attorneys Office
Ms. Lou A. Newman, Attorney at Law
West Publishing Company
Lexis-Nexis
LOIS Law

SUPREME COURT OF NORTH CAROLINA
CHRISTIE SPEIR CAMERON, Clerk

Fax: (919) 733-0105
Web: www.nccourts.org

Justice Building, 2E. Morgan Street
Raleigh, N C 27601
(919) 733-3723

Mailing Address:
P.O. Box 2170
Raleigh, NC 27602

18 August 2003

Ms. Carol D. Bennett
1709 Horton Road
Knightdale, NC 27545

From NC Court of Appeals
(COA02-377)
From Wake (00CVS5994)

Re: Dalenko and Bennett v Wake Co. DHS – No. 240P03

Dear Ms. Bennett:

Motion by Plaintiff for Temporary Stay has been filed and the following order entered:

"Motion Denied by order of the Court in conference this the 18th day of August 2003.

s/ Brady, J.
For the Court"

Very truly yours,

Christie Speir Cameron
Clerk of Supreme Court

Carol B. Templeton
Assistant Clerk

(APPENDIX H-3)

Copy to:
West Publishing
Lexis-Nexis
LOIS Law
Mr. Ralph A. White, Appellate Court Reporter
Ms. Corinne G. Russell, Deputy Wake Coutny Attorney,
For Wake Coutny Attorneys Office
Ms. Lou A. Newman, Attorney at Law

(APPENDIX H-4)

APPENDIX I

(6) "ORDERS"

COA02-377
(consecutive dates)

NORTH CAROLINA COURT OF APPEALS
RALEIGH, NORTH CAROLINA

Plaintiff: **Carol Bennett, individually**

Allowing Plaintiff's consecutive Motions To Extend Time To File Plaintiff-Appellant's Brief

filed on	allowed to
30 May 02	15 July 02
08 July 02	08 Aug 02
08 Aug 02	12 Aug 02
16 Aug 02	26 Aug 02
30 Aug 02	09 Sep 02
13 Sep 02	04 Oct 02

No.COA02-377
North Carolina Court of Appeals
****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

From Wake (00CVS5994)

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

FILED
02 MAY-31 PM 2:54
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

ORDER

The following order was entered:

The motion filed in this cause on the 30th day of May 2002 and designated "Motion To Extend Time To File Appellant Bennett's Brief" is allowed only as follows: The brief of Appellant Bennett shall be filed on or before 15 July 2002.

No further extensions of time to file plaintiff-appellant Bennett's brief shall be allowed in the absence of a showing of extraordinary cause.

By order of the Court this the 31st day of May 2002.

Witness my hand and official seal this the 31st day of May 2002.

s/ *John H. Connell*
John H. Connell
Clerk of North Carolina
Court of Appeals

(SEAL)

cc:
Ms. Carol Bennett
Ms. Corinne G. Russell
Mr. Lou A. Newman

No.COA02-377
North Carolina Court of Appeals
****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

From Wake
(00CVS5994)

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

FILED
02 JUL-10 PM 3:13
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

ORDER

The following order was entered:

The motion filed in this cause on the 8th day of July 2002 and designated "Appellant Bennett's 2nd Motion To Extend Time To File Bennett's Brief" is allowed. The brief of plaintiff-appellant Bennett shall be filed on or before 8 August 2002.

By order of the Court this the 10th day of July 2002.
Witness my hand and official seal this the 10th day of July 2002.

s/ *John H. Connell*
John H. Connell
Clerk of North Carolina
Court of Appeals
(SEAL)

cc:
Ms. Carol Bennett
Ms. Corinne G. Russell
Mr. Lou A. Newman

No.COA02-377
North Carolina Court of Appeals
****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

From Wake (00CVS5994)

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

FILED
02 AUG-8 PM 2:35
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

ORDER

The following order was entered:

The motion filed in this cause on the 8th day of August 2002 and designated "Appellant Bennett's Motion To Extend Time To File Brief And To Lengthen Brief" is allowed as to the motion to extend time to file brief. The brief of plaintiff-appellant Carol Bennett shall be filed on or before 12 August 2002. The motion to lengthen brief is denied.

By order of the Court this the 8th day of August 2002.
Witness my hand and official seal this the 8th day of August 2002.

s/ *John H. Connell*
John H. Connell
Clerk of North Carolina
Court of Appeals
(SEAL)

cc:
Ms. Carol Bennett
Ms. Corinne G. Russell
Mr. Lou A. Newman

No.COA02-377
North Carolina Court of Appeals
****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

From Wake (00CVS5994)

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

FILED
02 AUG-16 PM 4:17
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

ORDER

The following order was entered:

The motion filed in this cause on the 16th day of August 2002 and designated "Appellant Bennett's Motion To Extend Time To File Brief During Petition To Supreme Court" is allowed only as follows: Appellant Bennett's brief shall be filed on or before 26 August 2002.

By order of the Court this the 16th day of August 2002.
Witness my hand and official seal this the 16th day of August 2002.

s/ John H. Connell
John H. Connell
Clerk of North Carolina
Court of Appeals
(SEAL)

cc:
Ms. Carol Bennett
Ms. Corinne G. Russell
Mr. Lou A. Newman

No.COA02-377

North Carolina Court of Appeals

****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

From Wake (00CVS5994)

FILED
02 SEP-4 PM 3:25
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

ORDER

The following order was entered:

The motion filed in this cause on the 30th day of August 2002 and designated "Motion To Deem Bennett's Brief As Timely Filed" is referred to the panel to which the case will be assigned.

The brief filed by plaintiff-appellant Carol Bennett in this cause of action fails to comply with Appellate Rule 26(j) in that it contains more than "35 pages of text, exclusive of tables of contents, tables of authorities, and appendixes." The brief is therefore stricken. Plaintiff-Appellant shall file a substitute brief in full compliance with Rule 26(j) on or before 9 September 2002.

By order of the Court this the 4th day of September 2002.

Witness my hand and official seal this the 4th day of September 2002.

s/ *John H. Connell*
John H. Connell
Clerk of North Carolina
Court of Appeals
(SEAL)

cc:
Ms. Carol Bennett
Ms. Corinne G. Russell
Mr. Lou A. Newman

No.COA02-377
North Carolina Court of Appeals
****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs

From Wake
(00CVS5994)

V.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and Individual, LOU A. NEWMAN, a Professional, Defendants.

FILED
02 SEP-17 PM 3:52
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

ORDER

The following order was entered:

The motion filed in this cause on the 13th day of September 2002 and designated "Motion To Extend Time To File Substitute Brief Of Appellant Bennett" is allowed. Plaintiff-appellant shall file a substitute brief in full compliance with Rule 26(g) and Rule 28(j) on or before 4 Octrober 2002.

By order of the Court this the 16th day of August 2002. Witness my hand and official seal this the 16th day of August 2002.

s/ *John H. Connell*
John H. Connell
Clerk of North Carolina
Court of Appeals
(SEAL)

cc:
Ms. Carol Bennett
Ms. Corinne G. Russell
Mr. Lou A. Newman

APPENDIX J

"AFFIDAVIT OF JOHN H. CONNELL, CLERK"

No. COA02-377
SEPTEMBER 2, 2003

NORTH CAROLINA COURT OF APPEALS
RALEIGH, NORTH CAROLINA

Plaintiff: Carol Bennett, individually

Affirming timely filing of Plaintiff's Substitute Brief by U.S. Mail, October 4, 2002.

No. COA02-377

North Carolina Court of Appeals

****

LOUIS DALENKO, an incompetent, by Interim General Guardian, CAROL BENNETT, and CAROL BENNETT, individually, Plaintiffs,

v.

WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, Director, and SUSAN HARMON, Social Worker and individual, LOU A. NEWMAN, a Professional, Defendants

From Wake (00-CVS-5994)

****

AFFIDAVIT OF
JOHN H. CONNELL, CLERK

The undersigned, John H. Connell, first being duly sworn, deposes and says:

1. That he is the Clerk of the North Carolina Court of Appeals and keeper of the records of this Court.

2. That he personally examined records kept by the Court of Appeals in this appeal, COA02-377.

3. That Appellant Carol Bennett, individually, filed her Substitute Brief on Friday, October 4, 2002 by U.S. Mail in accordance with Rule 26(a)(1) of the N.C.R. App. P. and as required by the attached true copy of this Court's ORDER dated September 17, 2002, which extends her time through October 4, 2002.

4. That no documents were filed with this Court by the Defendants in this matter that allege Appellant Bennett's Substitute Brief was not timely filed on October 4, 2002.

Witness my hand and official seal this the 2 day of September 2003.

(Official Seal)

John H. Connell
Clerk of North Carolina Court of Appeals
2 W. Morgan Street
P.O. Box 2779
Raleigh, NC 27602
(919) 733-3561, (fax) 733-8003

APPENDIX K

"ORDER"

No. 95-SP-1297
NOVEMBER 27, 1995

JOHN M. KENNEDY
CLERK OF SUPERIOR COURT
WAKE COUNTY
RALEIGH, NORTH CAROLINA

In Re: Louis Dalenko (respondent)

Order memorializing the events surrounding the Cause of Action on November 16, 1995 for personal injury to Louis Dalenko, incompetent.

From: Special Proceedings on Incompetence & Guardianship of Louis Dalenko.

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION/
BEFORE THE CLERK
FILE NO: 95 SP 1297

In the Matter of:)
LOUIS DALENKO,)
Respondent)

ORDER

THIS MATTER comes before the Court on November 20, 1995, for emergency hearing on motions filed by David S. Brannon, attorney for Carol D. Bennett, daughter of Louis Dalenko, Respondent, and an interested party to this action. Before this Court are a Motion to Discharge the Guardian ad Litem, Ms. Lou Newman, and a Motion to Discharge the Interim Guardian, the Wake County Department of Social Services. Following presentation by counsel the Court enters the following:

FINDINGS OF FACT

1. That on November 16, 1995, this court declared Louis Dalenko, Respondent, incompetent.

2. That on November 16, 1995, this Court continued the deposition of this matter to December 15, 1995.

3. That this continuance was for the purpose of seeing whether the Respondent could remain in his home with his daughter.

4. That the granting of the continuance was based on a belief that the Respondent would be remaining in his home with his daughter.

5. That on the afternoon of November 16, 1995, the case worker, Ms. Susan Harmon, acting on behalf of the interim guardian, went to the home of Louis Dalenko and sought to

remove him from his home and place him in a nursing facility.

6. That the case worker was assisted in her efforts by law enforcement and the Raleigh Fire Department.

7. That the respondent, Louis Dalenko, was not removed from his home on this ocasion.

8. That in response to this action by the interim guardian the motions being heard this date were filed by the attorney for Carol Bennett.

Based on the foregoing findings of fact, this Court makes the following:

CONCLUSIONS OF LAW

1. That Thomas W. Hogan, Director, Wake County Department of Social Services, is the interim guardian in this matter. The Motion to discharge the interim guardian should be denied.

2. That Ms. Lou Newman is the guardian ad litem of the respondent. The Motion to discharge the guardian ad litem should be denied.

3. That the disposition of the incompetency proceeding, specifically the determination of who will serve as the guardian of Louis Dalenko, has been continued until December 15, 1995.

4. That, barring a medical emergency, it is in the best interests of the Respondent that he remain in his home with his daughter, Ms. Carol Bennett.

5. That, absent an order from this court, Louis Dalenko shall not be taken from his home and placed elsewhere.

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Motions to Discharge the interim guardian and the guardian ad litem are denied.

2. That, absent an order from this court, Louis Dalenko shall not be taken from his home and placed elsewhere.

3. That the Respondent shall have an independent evaluation of his situation and needs; that this evaluation should be performed by Aging Family Services in Wake County; that this evaluation shall be paid for from funds of the Respondent.

This is the 27 day of NOV., 1995.

s/: *John M. Kennedy*
Honorable John M. Kennedy
Clerk of Superior Court